TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 144.

HALLET KILBOURN, PLAINTIFF IN ERROR,

vs.

JOHN G. THOMPSON, JOHN M. GLOVER, J. D. NEW, B. B. LEWIS, AND A. HERR SMITH.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED MAY 29, 1877.

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1 *Declaration.—Filed Aug. 8th, 1876.*

In the supreme court of the District of Columbia, the 1st day of August, A. D. 1876.

HALLET KILBOURN, PLAINTIFF,
vs.
MICHAEL C. KERR, JOHN G. THOMPSON, JOHN M. GLOVER, JEPTHA D. NEW, BURWELL B. LEWIS, and A. HERR SMITH, defendants. } At law. No. 16288.

The plaintiff sues the defendants for that the said defendants, on the fourteenth day of March, in the year of our Lord one thousand eight hundred and seventy-six, at the District of Columbia aforesaid, with force and arms, assaulted the said plaintiff, and then and there, with force and arms, struck and beat him, the said plaintiff, with great violence, and then and there, with force and arms, forced and compelled him, the said plaintiff, to go from and out of his dwelling-house, situate
2–4 in said District, into the public street, and then and there forced and compelled him, the said plaintiff, to go in and along divers public streets to the common jail of the said District of Columbia, situate and being in said District, and then and there imprisoned the said plaintiff in said jail, and detained him in prison there, without any reasonable or probable cause whatsoever, for a long space of time, to wit, for the space of forty-five days then next following, contrary to law and against the will of the plaintiff; whereby the said plaintiff was then and there not only greatly hurt, bruised, and wounded, but was also thereby, then and there, greatly exposed and injured in his credit and circumstances, and in his reputation, and thereby was then and there made to suffer great affliction of body and mind, to wit, at the District of Columbia aforesaid.

Wherefore the said plaintiff saith that he is injured and hath sustained damages to the amount of one hundred and fifty thousand dollars, and therefore he brings this suit.

HILLYER & JEFFRIES,
Attorneys for Plaintiff.

5 Defendants are to plead hereto on or before the first special term of the court occurring twenty days after service hereof; otherwise judgment.

HILLYER & JEFFRIES,
Att'ys for Plaintiff.

Summons.—Issued August 8th, 1876.

In the supreme court of the District of Columbia.

HALLET KILBOURN, PLAINTIFF,
vs.
MICHAEL C. KERR, JOHN G. THOMPSON, JOHN M. GLOVER, JEPTHA D. NEW, BURWELL B. LEWIS, and A. HERR SMITH, defendants. } At law. No. 16288.

The President of the United States to the defendant, greeting:

You are hereby commanded to appear in this court on the first day

of its special term occurring 20 days after service of this writ on
6 you, to answer the plaintiff's suit, and show why he should not have judgment against you for the cause of action stated in his declaration.

Witness: D. K. Cartter, chief justice.

[SEAL OF COURT.] R. J. MEIGS, *Clerk*,
By J. R. YOUNG, *Ass't Clerk*.

HILLYER & JEFFRIES.

NOTE.—The special terms of the court commence on the first Tuesday of every month except August, in which month there is no term of the court.

(On back:)

Served copies of the declaration, notice to plead, affidavit, and this summons on the defendant Thompson; New, Lewis, & Smith not to be found; the others the 8th day of August, 1876.

ALEX. SHARP,
Marshal.

7 *Joint plea of def'ts John M. Glover, J. D. New, B. B. Lewis, & A. H. Smith.—Filed Sep. 5th, 1876.*

In the supreme court of the District of Columbia this 4th day of September, 1876.

HALLET KILBOURN, PL'FF, *vs.* MICHAEL C. KERR, JOHN G. THOMPSON, JOHN M. Glover, Jeptha D. New, Burwell B. Lewis, and A. Her rSmith, def'ts.	At law.	No. 16288.

The joint plea of the defendants, John M. Glover, Jeptha D. New, Burwell B. Lewis, and A. Herr Smith, severing in their defence.

And now comes the defendants, John M. Glover, Jeptha D. New, Burwell B. Lewis, and A. Herr Smith, and defend the force and injury complained against them, and severing in their defence, for a joint plea, say:

8 That as to the coming with force and arms, or whatsoever is against the peace, and also as to the assaulting, beating, bruising, battering, and ill-treating of the plaintiff in the above-entitled cause, Hallet Kilbourn, in manner and form as the said Kilbourn in his said declaration hath alleged to be done, these defendants say that they are not guilty thereof, and of this they put themselves upon the country.

And as the imprisonment of the said Hallet Kilbourn and the keeping and detaining him in confinement at the time in the said declaration mentioned, to wit, on the said fourteenth day of March, in the year one thousand eight hundred and seventy-six, and for the space of forty-five days then next following, in the said declaration mentioned, these defendants say that the said Hallet Kilbourn ought not to have or maintain his action aforesaid against them, because they say that long before and at the said time when the force and injuries complained of by the plaintiff are alleged to have been inflicted upon him, as stated in his declaration, and during all the time in the said declaration men-
9 tioned, a Congress of the United States was holden at the city of

Washington, in the county of Washington, and District of Columbia aforesaid, and was then and there and during all the time aforesaid assembled sitting.

And that long before and at the time when the force and injuries mentioned in said declaration are alleged to have been inflicted, and during all the time in the said declaration mentioned, these defendants were and yet are members of the House of Representatives (then and there being one of the houses whereof the said Congress of the United States consisted), and by virtue of their membership and the tenor and effect of the standing rules and orders ordained and established by the said House for the determining of the rules of its proceedings, and by the force and effect of the laws and customs of the said House and of the said Congress, were then and there and during all the time aforesaid and yet are duly authorized and required, and amongst other things it is and was their duty, to attend the sessions of the said House, to
10 obey its commands and orders, and to participate in its proceedings as members thereof on all questions and matters which came or may come before said House.

And during all the time in the said declaration mentioned one John G. Thompson (being the same John G. Thompson who is made one of the defendants by the plaintiff's declaration in this suit), was, and is yet *is*, Sergeant-at-Arms of the said House of Representatives, and by virtue of his office, and by the tenor and effect of the standing rules and orders ordained and established by the said House for the determining of the rules of its proceedings, and by the force and effect of the laws and customs of the said House and of the said Congress, was then and there, and during all the time aforesaid, and yet is, duly authorized and required, amongst other things, to execute the commands of the said House from time to time, together with all such process issued by authority thereof as shall be directed to him by the Speaker of the said House.

And that long before and at the time aforementioned in this plea, and during all the time in the declaration mentioned, one Michael
11 C. Kerr was the Speaker of the said House of Representatives, and by virtue of his said office, and by the tenor and effect of such standing rules and orders as aforesaid, and by the force and effect of such laws and customs as aforesaid, then and there and during all the time aforesaid was, amongst other things, duly authorized and required to subscribe with his proper hand and to seal with the sea o the House of Representatives all writs, warrants, and subpœnas issue by order of the said House.

And that long before and at the time aforementioned in the beginning of this plea, and during all the time in the said declaration mentioned, one George M. Adams was and yet is the Clerk of the said House of Representatives, and by virtue of his said office, and by the tenor and effect of such standing rules and orders as aforesaid, and by the force and effect of such laws and customs as aforesaid, then and there, and during all the time aforesaid, was and yet is, amongst other things, duly authorized and required to attest and subscribe with his proper
12 hand all such writs, warrants, and subpœnas issued by order of the said House.

And that long before and at the time mentioned in the beginning of this plea, and during all the time in the declaration mentioned and ever since, it was and yet is, amongst other things, ordained, established and practiced by and under such standing rules and orders as aforesaid, and such laws and customs as aforesaid, that all writs, warrants, subpœnas

and other process issued by order of the said House shall be under the hand of the said Speaker of the said House and attested by the Clerk of the said House, and so being under the hand of the said Speaker and seal of the said House, and attested by the said Clerk as aforesaid, shall be executed pursuant to the tenor and effect of the same by the said Sergeant-at-Arms.

And these defendants further say that the said John G. Thompson, so being such Sergeant-at-Arms of the said House of Representatives as aforesaid, and the said Michael C. Kerr, so being such Speaker of the House of Representatives as aforesaid, and the said George M. Adams, so being such Clerk of the said House as aforesaid, and the said Congress so being assembled and sitting as aforesaid, heretofore and before
13 the said time when the force and injuries complained of are alleged to have been committed, and while the said Congress was in session in the city of Washington, in the District of Columbia, to wit, on the 24th day of January, A. D. 1876, the said House of Representatives, then sitting in the city and District aforesaid, adopted the following preamble and resolution:

"Whereas the Government of the United States is a creditor of the firm of Jay Cook and Co., now in bankruptcy, by order and decree of the district court of the United States in and for the eastern district of Pennsylvania, resulting from the improvident deposits made by the Secretary of the Navy of the United States with the London branch of the said house of Jay Cook and Co. of the public moneys;

"And whereas the matter known as the real estate pool was only partially inquired into by the late joint select committee to inquire into the affairs of the District of Columbia, in which Jay Cook and Co. had a large and valuable interest;

"And whereas Edwin M. Lewis, trustee of the estate and effects of said firm of Jay Cook and Co., has recently made a settlement of
14 the interest of the estate of Jay Cook and Co. with the associates of said firm of Jay Cook and Co., to the disadvantage and loss, as it is alleged, of the numerous creditors of said estate, including the Government of the United States;

"And whereas the courts are now powerless by reason of said settlement to afford adequate redress to said creditors:

"Resolved, That a special committee of five members of this House, to be selected by the Speaker, be appointed to inquire into the nature and history of said real estate pool and the character of said settlement, with the amount of property involved in which Jay Cook and Co. were interested, and the amount paid or to be paid in said settlement, with power to send for persons and papers, and report to this House."

That in pursuance and by authority of the above recited resolution, the said Michael C. Kerr subsequently to the resolution, and before the time when the force and injuries complained of by the plaintiff are alleged to have been inflicted, as said Speaker of the House of Representatives, then sitting in the said city of Washington, appointed five members of the said House of Representatives to constitute said
15 committee, which was by him, as Speaker, to be appointed by virtue and in pursuance of the above recited resolution, which five members of the House of Representatives were the following, to wit, these defendants, John M. Glover, Jeptha D. New, Burwell B. Lewis, and A. Herr Smith, and one Henry O. Pratt, also a member of said House of Representatives.

And the said committee, so appointed by the said Michael C. Kerr as Speaker, duly organized in the said city of Washington, in the county

and District aforesaid, and in pursuance of and by virtue of the above recited resolution, passed by the said House of Representatives, proceeded to make the inquiry therein directed, and in obedience to the said above recited resolution, and in pursuance of said inquiry thereby directed and ordered, the said committee, by the authority in them vested by said resolution, caused to be issued by the said Michael C. Kerr, as Speaker, under his hand and the seal of the House of Representatives, and duly attested by the said George M. Adams, as Clerk, through Green Adams, chief clerk, a subpœna to the said Hallet Kilbourn, the plaintiff in this cause, by which the said Hallet Kilbourn was commanded
16 to appear before the said committee to testify and be examined touching and in regard to the matters to be inquired into by the said committee under and by virtue of the above recited resolution; and the said Hallet Kilbourn was further commanded and ordered by said subpœna to bring with him certain records, papers, and maps relating to said enquiry designated and described in the said subpœna and the exhibit thereto attached.

And subsequently to the issuing of the said subpœna, and before the time when the force and injuries complained of are alleged to have been inflicted, the said Hallet Kilbourn, in obedience to said subpœna, appeared before the said committee, and was examined by said committee in relation to and prosecution of the enquiry which they (the said members of the committee) were ordered and commanded to make and prosecute under and by force of the above recited resolution; and during the said examination the said Hallet Kilbourn was asked the following questions, "Will you state where each of the five members reside? and will you please state their names?" which said questions were pertinent and material to the said question of inquiry before the
17 said committee, but the said Hallet Kilbourn did knowingly and wilfully refuse to answer the said questions.

And the said Hallet Kilbourn, although ordered and commanded by the said subpœna to bring with him and produce before the said committee certain records, papers, and maps relating to said inquiry, still, when asked the following questions by the said committee, "Mr. Kilbourn, are you now prepared to produce, in obedience to the subpœna duces tecum, the records which you have been required by the committee to produce?" which records, papers, and maps were pertinent to the question of inquiry, the said Hallet Kilbourn knowingly and wilfully refused to produce the said records.

And subsequently to the above stated refusal by the said Hallet Kilbourn to answer the said questions, and to produce the said records, papers, and maps, and before the time when the force and injuries complained of are alleged to have been inflicted, to wit, on the fourteenth day of March, 1876, the committee reported to the said House of
18 Representatives, then sitting, the facts above stated in this plea, to wit, the resolution of the said House of Representatives creating the committee; the appointment of the members on said committee by the said Michael Kerr as Speaker; the issuing, at the instance of the said committee, of the subpœna duces tecum to the said Hallet Kilbourn; the appearance of the said Hallet Kilbourn before the said committee, in obedience to said subpœna, and his refusal to answer the above stated questions, and his further refusal to produce the said records, papers, and maps.

And the said committee, at the same time and place, further reported as follows to said House:

"The committee are of opinion and report that it is necessary, for the

efficient prosecution of the inquiry ordered by the House, that the said Hallet Kilbourn should be required to respond to the subpœna duces tecum, and answer the questions which he has refused to answer; and that there is no sufficient reason why the witness should not obey said subpœna duces tecum, and answer the questions which he has re-
19 fused to answer; and that his refusal as aforesaid is in contempt of this House," as by the journal, record, and proceedings, and report in the said House remaining, reference being thereto had, will more fully appear.

And the said House of Representatives, of which these defendants were members, so being assembled and sitting as aforesaid, heretofore and before the said time when the force and injuries complained of are alleged to have been inflicted, to wit, on the fourteenth day of March, 1876, at Washington aforesaid, in the county and District aforesaid, it was in and by said House, for good and sufficient cause to the same appearing, resolved and ordered, pursuant to the tenor and effect of such standing rules and orders so ordained and established as aforesaid, and according to the force and effect of such laws and customs as aforesaid, that the Speaker should forthwith issue his warrant, directed to the Sergeant-at-Arms, commanding him to take into custody the body of the said Hallet Kilbourn wherever to be found, and the same to have forthwith before the said House, at the bar thereof, to then and
20 there answer why he should not be punished as guilty of a contempt of the dignity and authority of the same, as by the journal, record and proceedings, resolutions, and order in the said House remaining, reference being thereto had, will more fully appear.

Whereupon Michael C. Kerr, so being such Speaker as aforesaid, in pursuance of such standing rules and orders as aforesaid, and according to such laws and customs as aforesaid, and for the execution of the resolution and order aforesaid, afterwards and before the time when, &c., in the introduction of this plea mentioned, to wit, on the said fourteenth day of March, in the year 1876, as such Speaker as aforesaid, in the county aforesaid, did duly make and issue his certain warrant, under his hand and the seal of the House of Representatives, duly directed to the said John G. Thompson, one of the defendants to this suit, as such Sergeant-at-Arms as aforesaid (to whom, so being such Sergeant-at-Arms as aforesaid, the execution of such warrant then and there
21 belonged), and by the said George M. Adams, so being such Clerk as aforesaid, duly attested; in and by said warrant reciting that the said House of Representatives had that day ordered the said Speaker to issue his warrant, directed to the said Sergeant-at-Arms, commanding him, the said Sergeant, to take into custody the body of the said Hallet Kilbourn wherever to be found, and the same forthwith to have before the said House, at the bar thereof, then and there to show cause why he should not be punished as guilty of contempt of the said House, and in the mean time to keep the said Kilbourn in custody to await the further action of the House; therefore it was required that the said John G. Thompson, as such Sergeant-at-Arms, should take into his custody the body of the said Hallet Kilbourn, and then forthwith to bring him before the said House, at the bar thereof, then and there to answer to the charge aforesaid, and to be dealt with by the said House according to the Constitution and laws of the United States, and in the mean time to keep the said Kilbourn in his custody to await the further ac-
22 tion of the House; and the said Michael C. Kerr, so being such Speaker as aforesaid, then and there, and before the said time when, &c., in the introduction of this plea mentioned, delivered the

said warrant to the said John G. Thompson, so being such Sergeant-at-Arms as aforesaid, to be executed in due form of law.

By virtue and in execution of which said warrant the said John G. Thompson, as such Sergeant as aforesaid, afterwards, to wit, at the same time when the force and injuries complained of are alleged to have been inflicted, at Washington aforesaid, in order to arrest the said Hallet Kilbourn and convey him in custody to the bar of the said House, to answer to the charge aforesaid, and to be dealt with by the said House according to the Constitution and laws of the United States, in obedience to the resolution and order aforesaid, and to the tenor and effect of the said warrant, so issued as aforesaid, went to the said Kilbourn and did then and there arrest him, the said Hallet Kilbourn, and did forthwith convey him to the bar of the said House, as it was lawful for the said John G. Thompson to do for the cause aforesaid.

And these defendants state that they did not in any manner assist in the arrest and imprisonment of the said Hallet Kilbourn, nor were they in any way concerned in the same; nor did they order or direct the same, save and except by their participation as members of said House and of said special committee in the acts and proceedings of said committee and of said House in the deliberations, votes, resolutions, and orders of said House, as herein set forth, in the due discharge of their duties as members of said House.

And subsequently to the bringing of the said Hallet Kilbourn to the bar of the said House in the custody of the said Sergeant-at-Arms, to wit, on the fourteenth day of March, 1876, such proceedings were had in and by the said House, that the said Hallet Kilbourn was then and there forthwith duly heard in his defence, and was duly examined by the said House of Representatives, through its said Speaker, and was asked in said examination the following question, to wit:

"Mr. Kilbourn, are you now prepared to answer, upon the demand of the proper committee of the House, where each of these five members reside?" meaning the members of the pool, which question was pertinent and material to the question under inquiry, but the said Hallet Kilbourn did knowingly and wilfully refuse to answer the said question so asked by the said House through its said Speaker.

And the said House, through its said Speaker, at the same time and place, asked the said Hallet Kilbourn the further question, to wit:

"Are you (meaning the said Kilbourn) prepared to produce, in obedience to the subpœna duces tecum, the records which you have been required by the committee to produce?" which said records were pertinent and material to the question under inquiry, but the said Hallet Kilbourn did knowingly and wilfully decline and refuse to produce the said records so asked for by the said House through its said Speaker.

Thereupon it was then and there resolved by the said House as follows, to wit:

"Resolved, That Hallet Kilbourn having been heard by the House pursuant to the order heretofore made requiring him to show cause why he should not answer questions propounded to him by a committee, and respond to subpœna duces tecum by obeying the same, and having failed to show sufficient cause why he should not answer said questions and obey said subpœna duces tecum, be, and is, therefore, considered in contempt of said House because of said failure.

"2nd. Resolved, That in purging himself of the contempt for which Hallet Kilbourn is now in custody the said Kilbourn shall be required

to state to the House whether he is now willing to appear before the committee of the House to whom he has hitherto declined to obey a certain subpœna duces tecum, and answer certain questions, and obey said subpœna deuces tecum, and make answer to said questions;
26 and if he answers that he is ready to appear before said committee and obey said subpœna duces tecum and answers said questions, then said witness shall have the privilege to so appear and obey and answer forthwith, or so soon as said committee can be convened, and that in the mean time the witness remain in custody; and in the event that said witness shall answer that he is not ready to so appear before said committee and obey said subpœna duces tecum and make answer to said questions as aforesaid, then that said witness be recommitted to the said custody for the continuance of the said contempt, and that such custody shall continue until the said witness shall communicate to this House through said committee that he is ready to appear before said committee and make such answer and obey said subpœna duces tecum; and that in executing this order the Sergeant-at-Arms shall cause the said Kilbourn to be kept in his custody in the common jail of the District of Columbia."

27 Whereupon the said Michael C. Kerr, so being such Speaker as aforesaid, in pursuance of such standing rules and order as aforesaid, and according to such laws and customs as aforesaid, and in execution of the order contained in said resolutions, did afterwards, to wit, at the same time when the force and injuries complained of are alleged to have been inflicted, to wit, upon the fourteenth day of March, 1876, at Washington aforesaid, in the county aforesaid, as such Speaker aforesaid, duly make and issue his certain warrant under his hand and the seal of the House of Representatives, duly directed to the defendant, John G. Thompson, as Sergeant-at-Arms as aforesaid (to whom, so being such Sergeant-at-Arms as aforesaid, the execution of such warrant then and there belonged), and by the said George M. Adams, so being such Clerk as aforesaid, duly attested, which said warrant was in the following words, to wit:

28 "Forty-fourth Congress, first session, Congress of the United States.

"IN THE HOUSE OF REPRESENTATIVES,
"*March 14th*, 1876.

"To JOHN G. THOMPSON, Esq.,
"*Sergeant-at-Arms of the House of Representatives:*

"SIR: The following resolution has this day been adopted by the House of Representatives:

"'Resolved, That in purging himself of the contempt for which Halet Kilbourn is now in custody, the said Kilbourn shall be required to tate to the House whether he is now willing to appear before the committee of this House, to whom he has hitherto declined to obey a certain duces tecum, and answer certain questions, and obey said subpœna duces tecum, and make answer to said question; and if he answers that he is ready to appear before said committee, and obey said subpœna duces tecum, and answer said questions, then said witness shall have the privilege to so appear and obey, and answer forthwith, or so soon as the committee can be convened; and that in the mean time the
29 witness remain in custody; and in the event that said witness shall answer that he is not ready to so appear before said commit-

tee, and obey said subpœna duces tecum, and make answer to said questions as aforesaid, then that said witness be recommitted to the said custody for the continuance of such contempt; and that such custody shall continue until the said witness shall communicate to this House, through said committee, that he is ready to appear before said committee and make such answer and obey such subpœna duces tecum; and that in executing this order the Sergeant-at-Arms shall cause the said Kilbourn to be kept in his custody in the common jail of the District of Columbia.'

"Now, therefore, you are hereby commanded to execute the same accordingly.

"In witness whereof I have hereunto set my hand and caused the seal of the House of Representatives to be affixed the day and year above written.

30 [SEAL.] "M. C. KERR,
"*Speaker.*

"Attest:
"GEORGE M. ADAMS, *Clerk.*"

And the said Michael C. Kerr, so being such Speaker as aforesaid, then and there and at the same time when the force and injuries complained of are alleged to have been inflicted, to wit, on the fourteenth day of March, 1876, delivered the said warrant to the said John G. Thompson, so being such Sergeant-at-Arms as aforesaid, to be executed in due form of law.

By virtue and in execution of which said warrant, according to its tenor and effect, the said John G. Thompson, as such Sergeant as aforesaid, afterwards, to wit, at the same time when the force and injuries complained of are alleged to have been inflicted, at Washington aforesaid, in order to arrest the said Hallet Kilbourn and convey him in custody to the common jail of the District of Columbia in obedience to the resolutions and orders aforesaid, and to the tenor and effect of
31 the said warrant so issued as aforesaid, went to the said Hallet Kilbourn, and then and there gently laid his hands on the said Hallet Kilbourn to arrest him, and did arrest the said Hallet Kilbourn by his body and take into custody and forthwith convey him to the common jail of the District of Columbia, and did keep him in custody therein until the eighteenth day of April, 1876; when and on which day, in response to a writ of habeas corpus issued by order of David K. Cartter, chief justice of the supreme court of the District of Columbia, and directed to the said John G. Thompson as Sergeant-at-Arms of the House of Representatives, requiring the said John G. Thompson as said Sergeant-at-Arms to produce the body of the said Hallet Kilbourn before the said chief justice David K. Cartter at the court-house in the city of Washington, in the District of Columbia, and by direction and order of said House of Representatives, the said John G. Thompson, as
32 Sergeant-at-Arms, conveyed the said Hallet Kilbourn in custody from the common jail of the said District of Columbia to the court-house of the said District, in the said city of Washington, and then and there at the time and place above stated, in compliance with and in obedience to the order of the said chief justice, David K. Cartter, made delivery of the said Hallet Kilbourn into the custody of the marshal for the District of Columbia.

And these defendants state that they did not in any manner assist in the last mentioned arrest and imprisonment of the said Hallet Kilbourn, nor were they in any way concerned in the same, nor did they order

or direct the same, save and except by their votes in favor of the last above mentioned resolutions and order commanding the Speaker to issue his warrant for said arrest and imprisonment, and (save and except) by their participation as members in the introduction of and assent to said official acts and proceedings of said House, which
33 these defendants did and performed as members of the said House of Representatives in the due discharge of their duties as members of said House, and not otherwise.

Which are the same several supposed trespasses whereof the said Hallet Kilbourn hath above in his said declaration complained against these defendants, and not other or different, with this, that these defendants do aver that the said Hallet Kilbourn, the now plaintiff, and the said Hallet Kilbourn in the said resolutions, orders, and warrants respectively mentioned, was and is one and the same person, and that at the said several times in this plea mentioned, and during all the time therein mentioned, the said Congress of the United States was assembled and sitting, to wit, at Washington aforesaid, in the county aforesaid, and these defendants were and are members of the House of Representatives, one of the houses of said Congress, and as such members, in said participation in the action of the House as above set forth,
34 voted in favor of said resolutions and orders as above set forth, and saving and excepting said participation in the action of the House as set forth in the body of this plea, they had no concern or connection in any manner or way with said supposed trespasses complained of against them by the plaintiff; and this these defendants are ready to verify.

Wherefore they pray judgment if the said Hallet Kilbourn ought to have or maintain his aforesaid action thereof against them.

WM. M. MERRICK,
WM. H. TRESCOTT,
and HENRY WISE GARNETT,
Att'ys for Defendants.

Separate plea of def't John G. Thompson.—Filed Sept. 5th, 1876.

In the supreme court of the District of Columbia, this 4th day of September, 1876.

35	HALLET KILBOURN, PL'FF, *vs.* MICHAEL C. KERR, JOHN G. THOMPSON, John M. Glover, Jeptha D. New, Burwell B. Lewis, and A. Herr Smith, d'f'ts.	At law.	No. 16288.

And now comes the defendant, John G. Thompson, and defends the force and injury complained against him, and for a further plea says—

That as to the coming with force and arms, or whatever is against the peace, and also as to the assaulting, beating, bruising, battering, and ill-treating of the plaintiff in the above entitled cause, Hallet Kilbourn, in manner and form as the said Kilbourn, in his said declaration, hath alleged to be done, this defendant saith that he is not guilty thereof, and of this he puts himself upon the country.

And as to the arrest and imprisonment of the said Hallet Kilbourn and to keeping and detaining him in confinement, at the time in
36 the said declaration mentioned, to wit, on the said fourteenth day of March, in the year one thousand eight hundred and sev-

enty-six, and for the space of forty-five days then next following, in the said declaration mentioned, this defendant saith that the said Hallet Kilbourn ought not to have or maintain his action aforesaid against him, because he saith that long before and at the said time when the force and injuries complained of by the plaintiff are alleged to have been inflicted upon him, as stated in his declaration, and during all the time in the said declaration mentioned a Congress of the United States was holden at the city of Washington, in the county of Washington and District of Columbia aforesaid, and was then and there, and during all the time aforesaid, assembled and sitting.

And that long before and at the time when the force and injuries mentioned in said declaration are alleged to have occurred, and during all the time in the said declaration mentioned, he, the said John G. Thompson, was, and yet is, Sergeant-at-Arms of the House of
37 Representatives (then and there being one of the Houses whereof the said Congress of the United States consisted), and by virtue of his office, and by the tenor and effect of the standing rules and orders ordained and established by the said House for the determining of the rules of its proceedings, and by the force and effect of the laws and customs of the said House and of the said Congress, was then and there, and during all the time aforesaid, and yet is duly authorized and required, amongst other things, to execute the command of the said House, from time to time, together with all such process issued by authority thereof as shall be directed to him by the Speaker of the said House.

And that long before and at the time aforementioned in this plea, and during all the time in the declaration mentioned, one Michael C. Kerr was the Speaker of the said House of Representatives, and by virtue of his said office, and by the tenor and effect of such standing rules and orders as aforesaid, and by the force and effect of such laws and cus-
38 toms as aforesaid, then and there, and during all the time aforesaid, was, amongst other things, duly authorized and required to subscribe with his proper hand, and to seal with the seal of the House of Representatives, all writs, warrants, and subpœnas issued by order of the said House.

And that long before and at the time aforementioned in the beginning of this plea, and during all the time in the said declaration mentioned, one George M. Adams was, and yet is, the Clerk of the said House of Representatives, and by virtue of his said office, and by the tenor and effect of such standing rules and orders as aforesaid, and by the force and effect of such laws and customs as aforesaid, then and there, and during all the time aforesaid, was, and yet is, amongst other things, duly authorized and required to attest and subscribe with his proper hand all such writs, warrants, and subpœnas issued by order of said House.

And that long before and at the time mentioned in the begin-
39 ning of this plea, and during all the time in the declaration mentioned, and ever since, it was and yet is, amongst other things, ordained, established, and practised by and under such standing rules and orders as aforesaid, and such laws and customs as aforesaid, that all writs, warrants, subpœnas, and other process issued by order of said House, shall be under the hand of the said Speaker of the said House, and seal of the said House, and attested by the said Clerk of the said House; and so being under the hand of the said Speaker of the said House, and seal of the said House, and attested by the said Clerk a aforesaid, shall be executed pursuant to the tenor and effect of the sam by the said Sergeant-at-Arms.

And the said John G. Thompson, the defendant, further saith that the said Michael C. Kerr, so being such Speaker of the said House of Representatives as aforesaid, and the said George M. Adams, so being such Clerk of the same House as aforesaid, and he, the said defendant, so being such Sergeant-at-Arms of the same House as aforesaid,
40 and the said Congress, so being assembled and sitting as aforesaid, heretofore and before the said time when the force and injuries complained of are alleged to have been committed, and while the said Congress was in session in the city of Washington, in the District of Columbia, to wit, on the 24th day of January, A. D. 1876, the said House of Representatives, then sitting in the city and District aforesaid, adopted the following preamble and resolution:

"Whereas the Government of the United States is a creditor of the firm of Jay Cook and Co., now in bankruptcy by order and decree of the district court of the United States in and for the eastern district of Pennsylvania, resulting from the *impoverished* deposits made by the Secretary of the Navy of the United States with the London branch of said house of Jay Cook & Co. of the public moneys; and whereas a matter known as the real estate pool was only partially inquired into by the late joint select committee to inquire into the affairs of the
41 District of Columbia, in which Jay Cook & Co. had a large and valuable interest; and whereas Edwin M. Lewis, trustee of the estate and effects of said firm of Jay Cook & Co., has recently made a settlement of the interest of the estate of Jay Cook & Co. with the associates of said firm of Jay Cook & Co. to the disadvantage and loss, as it is alleged, of the numerous creditors of said estate, including the Government of the United States; and whereas the courts are now powerless by reason of said settlement to afford adequate redress to said creditors:

"Resolved, That a special committee of five members of this House, to be selected by the Speaker, be appointed to inquire into the matter and history of said real estate pool and the character of said settlement, with the amount of property involved in which Jay Cook & Co. were interested, and the amount paid or to be paid in said settlement, with power to send for persons and papers and report to this House."

42 That in pursuance of and by authority of the above recited resolution, the said Michael C. Kerr, subsequently to the resolution and before the time when the force and inquiries complained of by the plaintiff are alleged to have been inflicted, as the said Speaker of the House of Representatives then sitting in said city of Washington, appointed five members of the said House of Representatives to constitute said committee which was by him as Speaker to be appointed by virtue and in pursuance of the above recited preamble and resolution, which five members of the said House of Representatives were the following, to wit, John M. Glover, Jeptha D. New, Burwell B. Lewis, A. Herr Smith, and Henry O. Pratt, and the said committee, so appointed by the said Michael C. Kerr as Speaker, duly organized in said city of Washington, in the county and District aforesaid, and in pursuance of and by virtue of the above recited preamble and resolution passed by the said House of Representatives, proceeded to make the inquiry therein directed, and in obedience to said above recited preamble and
43 resolution, and in pursuance of said inquiry thereby directed and ordered, the said committee by the authority in them vested by said resolution caused to be issued by the said Michael C. Kerr, as Speaker, under his hand and the seal of the House of Representatives, and duly attested by the said George M. Adams, as Clerk, through

Green Adams, chief clerk, a subpœna to the said Hallet Kilbourn, the plaintiff in this cause, by which the said Hallet Kilbourn was commanded to appear before the said committee to testify and be examined touching and in regard to the matter to be inquired into by the said committee, under and by virtue of the above recited preamble and resolution, and the said Hallet Kilbourn was further commanded and ordered by said subpœna to bring with him certain records, papers, and maps designated and described in the said subpœna and the exhibit thereto attached, said records, papers, and maps relating to said inquiry.

And subsequently to the issuing of the said subpœna and before the time when the force and injuries complained of are alleged to
44 have been inflicted, the said Hallet Kilbourn, in obedience to said subpœna, appeared before the said committee and was examined by said committee in relation to and in prosecution of the inquiry which they (the said members of the committee) were ordered and commanded to make and prosecute under and by force of the above recited preamble and resolution, and during the said examination the said Hallet Kilbourn was asked the following questions: "Will you state where each of the five members reside, and will you please state their names?" which said questions were pertinent and material to the said question of inquiry before the said committee, but the said Hallet Kilbourn did knowingly and wilfully refuse to answer the said questions.

And the said Hallet Kilbourn, although ordered and commanded by the said subpœna to bring with him and produce before the said committee certain records, papers, and maps relating to said inquiry, still when asked the following question by the said committee: "Mr. Kilbourn, are you now prepared to produce, in obedience to the sub-
45 pœna duces tecum, the records which you have been required by the committee to produce?" (which records, papers, and maps were pertinent to the question of inquiry), the said Hallet Kilbourn knowingly and wilfully refused to produce said records.

And subsequently to the above stated refusal by the said Hallet Kilbourn to answer the said questions and to produce the said records, papers, and maps, and before the time when the force and injuries complained of are alleged to have been inflicted, to wit, on the fourteenth day of March, 1876, the said committee reported to the said House of Representatives, then sitting, the facts above stated in this plea, to wit, the resolution of the said House of Representatives creating the committee, the appointment of the members on said committee by the said Michael C. Kerr as Speaker, the issuing at the instance of the said committee of the subpœna duces tecum to the said Hallet Kilbourn, the appearance of the said Hallet Kilbourn before said committee in obedience to said subpœna, and his refusal to answer the above
46 stated questions, and his further refusal to produce the said records, papers, and maps, and the said committee at the same time and place further reported as follows to said House:

"The committee are of opinion and report that it is necessary for the efficient prosecution of the inquiry ordered by the House that the said Hallet Kilbourn should be required to respond to the subpœna duces tecum and answer the questions which he has refused to answer; and that there is no sufficient reason why the witness should not obey said subpœna duces tecum and answer the questions whe he has refused to answer; and that his refusal as aforesaid is in contempt of this House," as by the journal, record and proceedings, and report in the said House remaining, reference being thereto had, will more fully appear.

And the said House of Representatives, so being assembled and sitting as aforesaid, heretofore and before the said time when, &c., in the introduction of this plea mentioned, to wit, on the fourteenth day of March, in the year 1876, at Washington, aforesaid, in the county
47 and District aforesaid, it was, in and by the said House, for good and sufficient cause to the same appearing, resolved and ordered, pursuant to the tenor and effect of such standing rules and orders so ordained and established as aforesaid, and according to the force and effect of such laws and customs as aforesaid, that the said Speaker should forthwith issue his warrant, directed to the Sergeant-at-Arms, commanding him to take into custody the body of the said Hallet Kilbourn wherever to be found, and the same to have forthwith before the said House, at the bar thereof, to then and there answer why he should not be punished as guilty of contempt of the dignity and authority of the same, and in the mean time to keep the said Kilbourn in his custody to await the further order of the said House, as by the journal, record, and proceedings of the said resolution and order in the said House remaining, reference being thereto had, will *now* fully appear.

Whereupon, Michael C. Kerr, so being such Speaker as aforesaid, in pursuance of such standing rules and orders as aforesaid, and for
48 the execution of the resolution and order aforesaid, afterwards and before the time, &c., in the introduction of this plea mentioned, to wit, on the said fourteenth day of March, in the year 1876, as such Speaker as aforesaid, in the county aforesaid, did duly make and issue his certain warrant under his hand and the seal of the House of Representatives, duly directed to the said John G. Thompson, the defendant, as such Sergeant-at-Arms as aforesaid, (to whom, so being such Sergeant-at-Arms as *as* aforesaid, the execution of such warrant then and there belonged), and by the said George M. Adams, so being such Clerk as aforesaid, duly attested; in and by said warrant reciting that the said House of Representatives had that day ordered the said Speaker to issue his warrant directed to the said Sergeant-at-Arms, commanding him, the said Sergeant, to take into custody the body of the said Hallet Kilbourn wherever to be found, and the same forthwith to have before the said House, at the bar thereof, then and there to answer why he should not be punished for contempt, and in the mean time to be
49 kept in his, the said John G. Thompson's, custody to await the further order of the said House; therefore it was required in and by said warrant that the said John G. Thompson, the defendant, as such Sergeant-at-Arms as aforesaid, should take into his custody the body of the said Hallet Kilbourn, and then forthwith to bring him before the said House, at the bar thereof, then and there to answer to the charges aforesaid, and to be dealt with by the said House according to the Constitution and laws of the United States, and in the mean time to keep the said Kilbourn in his custody to await the further order of the said House, and the said Michael C. Kerr, so being such Speaker as aforesaid, then and there, and before the said time when, &c., in the introduction of this plea mentioned, delivered the said warrant to the said defendant, John G. Thompson, so being such Sergeant-at-Arms as aforesaid, to be executed in due form of law.

By virtue and in execution of which said warrant the said John
50 G. Thompson, as such Sergeant as aforesaid, afterwards, to wit, at the same time when the force and injuries complained of are alleged to have been inflicted, at Washington aforesaid, in order to arrest the said Hallet Kilbourn and convey him in custody to the bar of the said House to answer to the charge aforesaid, and to be dealt with by the said

House according to the Constitution and laws of the United States, in obedience to the resolution and order aforesaid, and to the tenor and effect of the said warrant, so issued as aforesaid, went to the said Hallet Kilbourn, and then and there gently laid his hands on the said Hallet Kilbourn to arrest him, and did then and there arrest him by his body and take him into custody, and did then forthwith convey him to the bar of the said House, as it was lawful for the said John G. Thompson to do for the cause aforesaid; and thereupon such proceedings were had in and by the said House, that the said Hallet Kilbourn was then and there forthwith duly heard in his defence, and was duly examined by the said House of Representatives, through its said Speaker,
51 and was asked in said examination the following question, to wit, "Mr. Kilbourn, are you now prepared to answer, upon the demand of the proper committee of the House, where each of these five members reside?" (meaning the members of the pool), which question was pertinent and material to the question under inquiry; but the said Hallet Kilbourn did knowingly and wilfully refuse to answer the said question so asked by the said House through its said Speaker.

And the said House, through its said Speaker, at the same time and place, asked the said Hallet Kilbourn the further question, to wit, "Are you (meaning the said Hallet Kilbourn) prepared to produce, in obedience to the subpœna duces tecum, the records which you have been required by the committee to produce (which said records were pertinent and material to the question under inquiry), but the said Hallet Kilbourn did knowingly and wilfully decline and refuse to produce the said records so asked for by the said House, through its said Speaker.

52 Thereupon it was then and there resolved by the said House as follows:

"Resolved, That Hallet Kilbourn having been heard by the House, pursuant to the order heretofore made requiring him to show cause why he should not answer questions propounded to him by a committee and respond to the subpœna duces tecum by obeying the same and having failed to show sufficient cause why he should not answer said questions and obey said subpœna duces tecum, be, and is, therefore, considered in contempt of said House because of said failure.

"1. Resolved, That in purging himself of the contempt for which Hallet Kilbourn is now in custody, the said Kilbourn shall be required to state to the House whether he is now willing to appear before the committee of the House to whom he has hitherto declined to obey a certain subpœna duces tecum, and to answer certain questions and obey said subpœna duces tecum, and answer said questions; and if he answers that he is ready to appear before said committee and obey said subpœna
53 duces tecum, and answer said questions, then said witness shall have the privilege to so appear and obey and answer forthwith, or so soon as said committee can be convened, and that in the mean time the witness remain in custody; and in the event that said witness shall answer that he is not ready to so appear before said committee and obey said subpœna duces tecum, and make answer to said questions as aforesaid, then that said witness be recommitted to the said custody for the continuance of said contempt, and that such custody shall continue until the said witness shall communicate to this House through said committee that he is ready to appear before said committee and make such answer and obey said subœpna duces tecum; and that in executing this order the Sergeant-at-Arms shall cause the said Kilbourn to be kept in his custody in the common jail of the District of Columbia;" as

by the journal, record, and proceedings of the said resolutions
54 and orders in the said House remain'g, reference being thereto had, will more fully appear.

Whereupon the said Michael C. Kerr, so being such Speaker as aforesaid, in pursuance of such standing rules and orders as aforesaid, and according to such laws and customs as aforesaid, and in execution of the order contained in said resolutions, did afterwards, to wit, at the same time when the force and injuries complained of are alleged to have been inflicted, to wit, upon the fourteenth day of March, 1876, at Washington aforesaid, in the county aforesaid, as such Speaker aforesaid, duly make and issue his certain warrant under his hand and the seal of the House of Representatives, duly directed to the defendant, John G. Thompson, as Sergeant at Arms as aforesaid (to whom so being such Sergeant-at-Arms as aforesaid, the execution of such warrant then and there belonged), and by the said George M. Adams, so being such
55 Clerk as aforesaid, duly attested, which said warrant was in the following words, to wit:

"Forty-fourth Congress, first session, Congress of the United States.

"IN THE HOUSE OF REPRESENTATIVES.
"*March 4th*, 1876.

"To JOHN G. THOMPSON, Esq.,
"*Sergeant-at-Arms of the House of Representatives:*

"SIR: The following resolution has this day been adopted by the House of Representatives:

"'Resolved, That in purging himself of the contempt for which Hallet Kilbourn is now in custody, the said Kilbourn shall be required to state to the House whether he is now willing to appear before a committee of this House, to whom he has hitherto declined to obey a certain subpœna duces tecum and answer certain questions, and obey said subpœna duces tecum and make answer to said questions, and if he answers that he is ready to appear before said committee and obey said subpœna duces tecum and answer said questions, then said wit-
56 ness shall have the privilege to so appear and obey and answer forthwith, or so soon as the committee can be convened, and that in the meantime the witness shall remain in custody; and in the event that said witness shall answer that he is not ready to so appear before said committee and obey said subpœna duces tecum and make answer to said questions as aforesaid, then that said witness be recommitted to the said custody for the continuance of such contempt, and that such custody shall continue until the said witness shall communicate to this House, through said committee, that he is ready to appear before said committee and make such answer and obey said subpœna duces tecum; and that in executing this order the Sergeant-at-Arms shall cause the said Kilbourn to be kept in his custody in the common jail of the District of Columbia.'

"Now, therefore, you are hereby commanded to execute the same accordingly.

"In witness whereof I have hereunto set my hand and caused
57 the seal of the House of Representatives to be affixed the day and year above written.

[SEAL.] "M. C. KERR, *Speaker.*

"Attest:
"GEORGE M. ADAMS, *Clerk.*"

And the said Michael C. Kerr, so being such Speaker as aforesaid, then and there, and at the same time when the force and injuries complained of are alleged to have been inflicted, to wit, on the fourteenth day of March, 1876, delivered the said warrant to the said John G. Thompson, so being such Sergeant-at-Arms as aforesaid, to be executed in due form of law; by virtue and in execution of which said warrant, according to its tenor and effect, the said John G. Thompson, as such Sergeant-at-Arms as aforesaid, afterwards, to wit, at the same time when the force and injuries complained of are alleged to have been inflicted, at Washington aforesaid, in order to arrest the said Hallet Kilbourn and convey him in custody to the common jail of the District of Columbia, in obedience to the resolutions and orders aforesaid,
58 and to the tenor and effect of the said warrant so issued as aforesaid, went to the said Hallet Kilbourn, and then and there gently laid his hands on the said Hallet Kilbourn to arrest him, and did then and there arrest him by his body and take him into custody, and forthwith convey him to the common jail of the District of Columbia, and did keep him in custody therein until the eighteenth day of April, 1876, when and on which day, in response to a writ of habeas corpus issued by order of David K. Cartter, chief justice of the supreme court of the District of Columbia, and directed to the said John G. Thompson, as Sergeant-at-Arms of the House of Representatives, requiring the said John G. Thompson, as said Sergeant-at-Arms, to produce the body of the said Hallet Kilbourn before the said Chief Justice David K. Cartter, at the court-house in the city of Washington, in the District of Columbia; and by direction and order of the said House of Representatives the said John G. Thompson, defendant, as Sergeant-at-
59 Arms, conveyed the said Hallet Kilbourn in custody from the common jail of said District of Columbia to the court-house of said District, in the said city of Washington, and then and there at the time and place above stated, in compliance with and in obedience to the order of the said Chief Justice David K. Cartter, then and there made delivery of the said Hallet Kilbourn into the custody of the marshal for the District of Columbia, nor has he had the said Hallet Kilbourn in his custody since the said delivery to the said marshal for the District of Columbia.

Which are the same several supposed trespasses whereof the said Hallet Kilbourn hath above in his said declaration complained against the said John G. Thompson, and not other or different; with this, that the said John G. Thompson doth aver that the said Hallet Kilbourn, the now plaintiff, and the said Hallet Kilbourn in the said resolutions, orders, and warrants respectively mentioned, was and is one and
60 the same person; and that at the said several times in this plea mentioned, and during all the time therein mentioned, the said Congress of the United States was assembled and sitting, to wit, at Washington aforesaid, in the county aforesaid, and this the said John G. Thompson is ready to verify; wherefore he prays judgment if the said Hallet Kilbourn ought to have or maintain his aforesaid action thereof against him, the said John G. Thompson, to recover damages for the force and injuries alleged in the declaration of said plaintiff to have been inflicted.

WM. M. MERRICK,
WM. H. TRESCOTT,
HENRY WISE GARNETT,
Att'ys for D'f't.

Joinder of issue and demurrer.—Filed Dec. 1st, 1876.

In the supreme court of the District of Columbia, this 28th day of November, A. D. 1876.

61 HALLET KILBOURN, PLAINTIFF,
vs.
MICHAEL C. KERR, JOHN G. THOMPSON, JOHN M. Glover, Jeptha D. New, Burwell B. Lewis, and A. Herr Smith, defendants.

The plaintiff joins issue upon the plea of not guilty by the said defendant John G. Thompson, and as to the remainder of said plea, the plaintiff says the same is bad in substance.

The questions of law intended to be argued are:

1st. That the said House of Representatives was without jurisdiction in the premises to imprison for contempt.

2nd. That said committee of said House of Representatives, in reporting to said House their opinion as stated in said plea, "That it is necessary for the efficient prosecution of the inquiry ordered by the House that the said Hallet Kilbourn should be required to respond to the subpœna duces tecum, and answer the questions which he has
62 refused to answer; and that there is no sufficient reason why the witness should not obey said subpœna duces tecum, and answer the questions which he has refused to answer; and that his refusal as aforesaid is in contempt of this House," acted in the premises without authority of law.

3rd. That said warrant issued by said Speaker was issued without authority of law.

4th. That said warrant issued by said Speaker for the arrest of the said plaintiff, having been issued without authority of law, the same is no protection in law to the said defendant.

HILLYER & JEFFRIES,
Attorneys for Plaintiff.

Joinder of issue and demurrer.—Filed Dec. 1st, 1876.

In the supreme court of the District of Columbia, this 28th day of November, A. D. 1876.

63 HALLET KILBOURN, PLAINTIFF,
vs.
MICHAEL C. KERR, JOHN G. THOMPSON, John M. Glover, Jeptha D. New, Burwell B. Lewis, and A. Herr Smith, defendants. At law. No. 16288.

The plaintiff joins issue upon the plea of not guilty by the said defendant John M. Glover, Jeptha D. New, Burwell B. Lewis, and A. Herr Smith, and as to the remainder of said plea, plaintiff says the same is bad in substance.

The questions of law intended to be argued are:

1st. That the said House of Representatives was without jurisdiction in the premises to imprison for contempt.

2nd. That said committee of the House of Representatives, in reporting to said House their opinion as stated in said plea, "That it is necessary for the efficient prosecution of the inquiry ordered by the House

that the said Hallet Kilbourn should be required to respond to
64 the subpœna duces tecum, and answer the questions which he has refused to answer; and that there is no sufficient reason why the witness should not obey said subpœna duces tecum, and answer the questions which he has refused to answer; and that his refusal as aforesaid is in contempt of this House," acted in the premises without authority of law.

3rd. That said warrant issued by said Speaker was issued without authority of law.

4th. That said warrant issued by said Speaker, for the arrest of the said plaintiff, having been issued without authority of law, the same is no protection in law to the said defendants, or any of them.

HILLYER & JEFFRIES,
Attorneys for Plaintiff.

Joinder in demurrer.—Filed Dec. 21st, 1876.

In the supreme court of the District of Columbia, this 21st day of December, 1876.

65 HALLET KILBOURN
vs.
MICHAEL C. KERR, JOHN G. THOMPSON, JOHN M. Glover, Jeptha D. New, Burwell B. Lewis, and A. Herr Smith. } At law. No. 16288.

The defendants John M. Glover, Jeptha D. New, Burwell B. Lewis, and A. Herr Smith say that their plea is good in substance.

WM. M. MERRICK,
WM. H. TRESCOTT,
and HENRY WISE GARNETT,
Att'ys for Defendants.

Joinder in demurrer.—Filed Dec. 21st, 1876.

In the supreme court of the District of Columbia, this 21st day of December, 1876.

HALLET KILBOURN
vs.
MICHAEL C. KERR, JOHN G. THOMPSON,
66 John M. Glover, Jeptha D. New, Burwell B. Lewis, and A. Herr Smith. } At law. No. 16288.

The defendant John G. Thompson says his plea is good in substance.

WM. M. MERRICK,
WM. H. TRESCOTT,
and HENRY WISE GARNETT.
Att'ys for Defendant.

Proceedings before the supreme court of the District of Columbia, holding a special term and circuit court in and for said District, commencing the third Monday, 16th day of October, A. D. 1876.

MONDAY, *October 16th*, 1876.

By order of Chief Justice Cartter, one of the justices of said supreme court, presiding, the court is opened by proclamation of the marshal, pursuant to rule of court.

67 FRIDAY, *December 22d*, 1876.

Session resumed pursuant to adjournment. Chief Justice Cartter presiding.

HALLET KILBOURN, P'LFF,
vs.
MICHAEL C. KERR, JOHN G. THOMPSON, JOHN M. Glover, Jeptha D. New, Burwell B. Lewis, & A. Herr Smith, def'ts. } At law. No. 16288.

Now comes here Mr. Garnett, attorney, and suggests the death of defendant Kerr, and the same is not denied. Therefore it is considered that this suit, as to him, stands abated, and the court orders that the demurrers filed to the defendants' pleas in this case be heard in the general term in the first instance.

68 Proceedings before the supreme court of the District of Columbia, sitting in general term, commencing Monday, January 1st, A. D. 1877.

Present, Chief Justice Cartter, and Justices Olin, Wylie, Humphreys, and MacArthur.

WEDNESDAY, *March* 21, 1877.

Session resumed pursuant to adjournment. Present, Justices Olin, Wylie, Humphreys, and MacArthur.

HALLET KILBOURN, PLAINTIFF,
vs.
MICHAEL C. KERR, JOSEPH G. THOMPSON, John M. Glover, Jeptha P. New, Burwell B. Lewis, and A. Herr Smith, defendants. } At law. No. 16288.

And now again come here as well the plaintiff as the defendants (except Michael C. Kerr, who has departed this life), by their respective attorneys.

69 And, thereupon, because it appears to the court here that the pleas of the defendants are good in substance: therefore, it is considered that the plaintiff's demurrers thereto, ordered for hearing here in the first instance, be and the same are hereby overruled. Whereupon it is considered by the court that the plaintiff take nothing by his suit, and that the defendants go thereof without day and recover against the plaintiff the costs of their defence, to be taxed by the clerk, and have execution thereof.

Wylie, justice, and the chief justice dissenting.

No opinions filed.

R. J. MEIGS, *Clerk*.

70 In the supreme court of the District of Columbia, the 24th day of March, 1877.

HALLET KILBOURN
vs.
JOHN G. THOMPSON ET AL. } At law. No. 16288. In error.

Know all men by these presents that we, Hallet Kilbourn and John F. Olmstead, are bound unto the above-named defendants in the sum of one thousand dollars, to be paid to the said defendants, their executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals and dated this 24th day of March, 1877.

Whereas the above named Hallet Kilbourn has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above suit by the said supreme court of the District of Columbia:

Now, therefore, the condition of this obligation is, that if the above-named Hallet Kilbourn shall prosecute his said writ of error to effect, and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

HALLET KILBOURN. [SEAL.]
JOHN F. OLMSTEAD. [SEAL.]

Sealed and delivered in presence of—
S. C. BOYNTON.
JOHN BULL.

Approved March 27, 1877.

MACARTHUR,
Justice.

We are satisfied with this bond.
Mar. 27, 1877.

H. H. GARNETT,
For Counsel for Def'ts.

71 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the chief justice and justices of the supreme court of the District of Columbia, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said court before you, between Hallet Kilbourn, plaintiff, and Michael C. Kerr, John J. Thompson, John M. Glover, Jephtha D. New, Barnett B. Lewis, and A. Hew Smith, defendants, at law, No. 16288, a manifest error hath happened to the great damage of the said plaintiff, as by his complaint appears; and it being fit that the error, if any hath happened, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf: Therefore you are hereby commanded, if judgment be therein given, under your seal, distinctly and openly, to send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at

Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the United States, this 26th day of April, in the year of our Lord, 1877, and of the Independence of the United States the 101st.

[SEAL.] R. J. MEIGS, *Clerk.*

DISTRICT OF COLUMBIA, *to wit:*

To John J. Thompson, John M. Glover, Jephtha D. New, Barnett B. Lewis, and A. Hew Smith.

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the District of Columbia, wherein Hallet Kilbourn is plaintiff and you are defendants, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, so that speedy justice be done the parties in that behalf.

Witness D. K. Cartter, chief justice of the supreme court of the District of Columbia.

D. K. CARTTER,
Chief Justice, &c.

Service admitted for defendants.
April 26, 1877.

HENRY WISE GARNETT,
Of Counsel for Defendants.

72 CLERK'S OFFICE,
Supreme Court of the District of Columbia, ss:

I, Return J. Meigs, clerk of the said court, do hereby certify that the writings annexed to this certificate are true copies of originals on file and of record in said office, and that said originals together constitute the record of the proceedings of said court in this cause.

Witness my hand and the seal of said court this 26th day of April, A. D. 1877.

[SEAL.] R. J. MEIGS, *Clerk,*
By J. JAY CAMP,
Ass't Clerk.

(Indorsement on cover:) No. 144. Hallet Kilbourn, plaintiff in error, vs. John G. Thompson, John M. Glover, J. D. New, B. B. Lewis, and A. Herr Smith. District of Columbia sup. court. Filed 29th May, 1877.

IN THE

Supreme Court of the United States.

No. 144.—October Term, 1879.

Hallet Kilbourn, Plaintiff in Error,

vs.

John G. Thompson et al., Defendants in Error.

BRIEF FOR PLAINTIFF IN ERROR.

CHARLES A. ELDREDGE,
ENOCH TOTTEN,
For Plaintiff in Error.

Joseph L. Pearson, Printer, 9th and D streets, Washington.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1879.

HALLET KILBOURN, PLAINTIFF IN ERROR,
vs.
JOHN G. THOMPSON ET AL., DEFENDANTS IN ERROR.
No. 144.

Brief for Plaintiff in Error.

This is an action of trespass and pleas of justification and demurrer. The pleas of justification set out as defences that the assault and imprisonment were in pursuance of proceedings had against the plaintiff by the House of Representatives, for refusing to answer a pertinent question put by a select committee of investigation, and to produce books, papers, and maps which he had been ordered to produce.

On the 28th day of January, 1876, the House of Representatives adopted the following preamble and resolutions:

"Whereas the government of the United States is a creditor of the firm of Jay Cooke & Co., now in bankruptcy, by order and decree of the District Court of the United States in and for the Eastern District of Pennsylvania, resulting from the improvident deposits made by the Secretary of the Navy of the United States with the London branch of the said house of Jay Cooke & Co. of the public

moneys; and whereas the matter known as the real-estate pool was only partially inquired into by the late Joint Select Committee to inquire into the affairs of the District of Columbia, in which Jay Cooke & Co. had a large and valuable interest; and whereas Edwin M. Lewis, trustee of the estate and effects of said firm of Jay Cooke & Co., has recently made a settlement of the interest of the estate of Jay Cooke & Co. with the associates of said firm of Jay Cooke & Co., to the disadvantage and loss, as it is alleged, of the numerous creditors of said estate, including the government of the United States; and whereas the courts are now powerless, by reason of said settlement, to afford adequate redress to said creditors:

"*Resolved*, That a special committee of five members of this House, to be selected by the Speaker, be appointed to inquire into the nature and history of said real-estate pool and the character of said settlement, with the amount of property involved, in which Jay Cooke & Co. were interested, and the amount paid or to be paid in said settlement, with power to send for persons and papers, and report to this House."

The defendants, John M. Glover, Jeptha D. New, Burwell B. Lewis, and A. Herr Smith, and also one Henry O. Pratt, were selected as such committee by the Speaker, and were appointed by the House of Representatives, in pursuance of the said resolutions. In the prosecution of the inquiry directed by the resolution, the House of Representatives issued a subpœna requiring the plaintiff to appear before the committee for examination, and to bring with him certain records, papers, and maps. He did appear, but during the course of the examination he refused to answer questions put to him and deemed by the committee to be pertinent and material, and also refused to produce the records, papers, and maps which he was called upon to produce. These facts and circumstances were reported by the committee to the House; the House thereupon directed a warrant of arrest to be issued against the plaintiff, and in obedience to its mandate the sergeant-at-arms, on the 14th day of March, 1876, arrested and took the plaintiff into custody, and brought him before the House of Representatives, when he

was heard in his defence, and was asked if he was prepared to answer the question which he had previously refused to answer, and to produce the record called for; upon his refusal to answer the question and to produce the records, the House of Representatives directed its sergeant-at-arms, the said defendant, John G. Thompson, to detain the plaintiff in his custody, and in the common jail of the District of Columbia, until he should purge himself of the alleged contempt of the House of Representatives.—(6, 7, 8.) The plaintiff was imprisoned by the said Thompson in the common jail of the District of Columbia for the space of forty-five days, and until he was set at liberty by the Supreme Court of the District of Columbia.

The members of the select committee who were sued, joined in a special plea, setting out in detail the foregoing facts, and the defendant Thompson interposed a plea of the same character; to their special pleas the plaintiff demurred, and the Supreme Court of the District of Columbia overruled the demurrers and gave judgment for the defendants.

The plaintiff sued out a writ of error and removed the cause here for review.

Assignment of Error.

The court below erred in ~~sustaining~~ overruling the demurrers, and in holding that the matters and things alleged in the said special pleas constituted a defence to the plaintiff's action.

Argument and Authorities.

The question raised by the pleadings here, and to be determined by the court, is whether or not the facts alleged in these pleas constitute a defence, or, in other words, did the House of Representatives possess the power to punish the plaintiff, as for a contempt, upon the facts set out in the special pleas?

The counsel for the plaintiff insist that it did not, because of the act of Congress approved January 24, 1857, (11 Stat.,

155,) as the same was modified by Congress in the Revised Statutes of the United States. This law, as it stands now, and as it did stand when the acts complained of were committed, is in the language following, to wit:

"SEC. 102. Every person who, having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than one thousand dollars nor less than one hundred dollars, and imprisonment in a common jail for not less than one month nor more than twelve months."

"SEC. 104. Whenever a witness summoned as mentioned in section one hundred and two fails to testify, and the facts are reported to either House, the President of the Senate, or the Speaker of the House, as the case may be, shall certify the fact, under the seal of the Senate or House, to the district attorney of the District of Columbia, whose duty it shall be to bring the matter before the grand jury for their action."—(Revised Statutes, 17.)

The printed volumes of the Revised Statutes, by official proclamation, became "legal evidence of the laws and treaties therein contained in all courts of the United States," on the 22d day of February, 1875.—(18 Stat., 113; see official certificate of the Secretary of State, prefixed to the printed volumes of the Revised Statutes.) The act of Congress establishing as law the provisions contained in the volumes of the "Revised Statutes" was approved June 22, 1874.—(R. S., 1,092.)

The act of 1857 was, in the revision of the laws, much altered, but the material modification was in the omission of the words, "in addition to the pains and penalties now existing," where they occur in the first section of that act.

This act defines the offence of refusing to answer questions or produce books and papers, and prescribes the punishment. When a statute fixes the punishment for an offence, no other punishment, be it greater or less, can be

inflicted.—(*Haney* vs. *State*, 5 Wis., 529; *Scrinegrowe* vs. *State*, 1 Chand., 48.) And this is true in matters of contempt.—(*Brinkley* vs. *Commonwealth*, 2 J. J. Marsh., 572; *Ex-parte* Edwards, 11 Fla., 174; *Dunham* vs. *State*, 6 Iowa, 245; *People* vs. *Liscomb*, 60 N. Y., 559.)

Double penalties cannot be inflicted.—(*Driskill* vs. *Parish*, 3 McLean, 640; *City of Brooklyn* vs. *Tanybee*, 31 Barb., 282; *Sipperly* vs. *R. R. Co.*, 9 How. Pr., 83; *Washburn* vs. *McInroy*, 7 John., 134; *Tiffany* vs. *Driggs*, 12 John., 253.)

Because, as a punishment, the law has denounced a loss of two of the rights of citizenship, it does not follow that a third right is to be withheld from the delinquent. Indeed, the reverse result is the reasonable deduction, because it is clear on common principles that no penalty for crime can be inflicted except that which is expressly prescribed. The fact that several penal consequences are annexed by statute to the commission of a breach of law cannot warrant the aggravation, by the judicial hand, of the punishment prescribed.—(*The State* vs. *Pritchard*, American Law Register, N. S., vol. 12, p. 518, and 19 N. J.; *Ex-parte Lang*, 18 Wall., 163; *Rex* vs. *Wright*, 1 Burrow, 544; *State* vs. *Bishop*, 7 Conn., 185; *Republic* vs. *De Longchamps*, 1 Dall., 116; *Scrinegrowe* vs. *State*, 1 Chand., 48; *Embry* vs. *State*, 107 Mass., 172; *State* vs. *Egglesht*, 41 Iowa, 574.)

Perjury being punished by the ordinary criminal tribunals, is not punishable as a contempt.—(Cush. Par. L., sec. 1012–14) This author declares that there are many crimes which the House has no jurisdiction to punish.—(Cush., 1052.)

The fact that the Congress provided by the statute of 1857, for the indictment and trial of a recusant witness is conclusive of the intention of Congress to have the whole case tried and determined in the court, so that whether the witness has *criminally* refused to answer shall be ascertained by the verdict of a jury.

A man may commit an act in the presence of a court which would be an undoubted "contempt," and punishable

as such, and at the same time be punishable by indictment. —(See *Yates* vs. *Lansing*, 9 John., 395.) But if the statute prescribed a penalty for that particular act, committed in presence of a court, the court clearly could not inflict an additional penalty.

Could the House "expel a member" and also commit him for contempt for the same act? Has the House of Representatives greater power over "contempts" than the courts? Can its power not be regulated by Congress? Are its powers over contempts express, or are they necessarily implied?

The power claimed here is purely judicial, and the only powers expressly granted by the Constitution to the House, which have any similarity to judicial power, are—

1. It "shall be the judge of the elections, returns, and qualifications of its own members."

2. It may authorize a number smaller than a quorum "to compel the attendance of absent members, in such manner and under such penalties" as it may provide.

3. It may "punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member."

4. And it has "the sole power of impeachment."

These powers partake of a judicial nature, but neither House can exercise the judicial instruments of the courts, such as the *subpœna duces tecum*, *fieri facias*, and the like, without an act of Congress, made under the general power contained in the last paragraph of sec. 8, art. I., to pass all laws "necessary and proper," &c., &c. Nor can either House authorize one of its own members to administer oaths. This power was given by the act of Congress of May 3, 1798.—(R. S., 17.) All "investigating" committees ordered by the House, unless authorized by an act of Congress passed to carry into execution one or more of the powers above named vested by the Constitution in the House of Representatives, are unauthorized and unwarranted by law. If crime has been committed the "grand

jury" shall investigate; if fraud, the courts of equity and law.

All the judicial power is vested in the courts by the Constitution.

Implied Powers do not Exist in Either House.

The argument that the English Parliament punishes for contempts is unsound. We are not governed under the British constitution.

Parliament exercises this power under positive law.

The powers of the states of the United States are plenary; they possess all the powers not delegated to the United States.

All state courts punish for contempts by virtue of express statutory enactments, and so do the United States courts. —(As to latter, see R. S., secs. 721 and 725.)

The argument that it is "necessary" for self-preservation or maintenance of good order is also unsound. Congress may by law provide for the punishment of all offenders against good order, under the last paragraph of sec. 8, art. I., of the Constitution. It has done so by providing a sergeant-at-arms and assistants for both houses of Congress.—(R. S., 9 and 10.)

The power to punish for contempt cannot be held to be implied without violating many cardinal provisions of the Constitution, to wit:

1. The 10th amendment, relating to the reserved rights of the people.

2. The 1st section, article III., depositing the judicial power of the United States in the supreme and inferior courts.

3. The 4th amendment, preserving the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches.

4. The 3d paragraph, sect. 9, art. I., which declares that no *ex post facto* law shall be passed.

There is no written law on the subject of punishing contempts in the House, and the penalty is declared after the fact, and the degree thereof rests in the irresponsible discretion or caprice of the members of the House. The laws of Caligula were fixed, although not published. The laws of the House, as asserted here, are neither known nor fixed. Caligula arrested his subjects and tried them according to the existing written law; the House of Representatives arrests citizens of the United States, and tries, convicts, and punishes them without any law whatever.

5. The 5th amendment: *a.* It puts a man twice in jeopardy. *b.* It deprives him of his liberty without "due process" of law.

6. The third paragraph of section 2, article III., which provides that the trial of all crimes, except in cases of impeachment, shall be by jury. A contempt of court is an "*offence*" against the United States. (See authorities in next paragraph.) There is no such thing as an offence against the House of Representatives.

7. The second section, article II., which confides to the Executive the power "to grant reprieves and pardon all offences against the United States, except in cases of impeachment." (See 3 Story on Con., § 1495, where he says a citizen committed by the House for contempt is beyond the reach of the pardoning power!) (*In re* Mullee, 7 Blatchf., 28; *Ex parte* Kearney, 7 Wheat., 38; *In re* Dixon, 3 Opin., 622; *In re* Rowan, 4 Opin., 458; *In re* Drayton & Sears, 5 Opin., 579; *State* vs. *Sauvinet*, 24 La. Ann., 119.)

8. It violates also the provisions of the second paragraph of article VI., which provides that "this Constitution, and the laws of the United States which shall be made in pursuance thereof, * * * shall be the supreme law of the land." This "implied" power, if sustained, will override the act of 24th January, 1857, and sections 102 and 103, R. S.

It has been recently held by the Privy Council of Great Britain that the power to punish for contempt was not in-

herent in legislative assemblies nor necessary to the proper discharge of their duties. In one of the opinions the case of *Dunn* vs. *Anderson*, (6 Wheat., 225,) and the assertions of Judge Story, in his Commentaries on our Constitution, were referred to with disapprobation.—(*Kielley* vs. *Carson*, 4 Moore's Privy Council Cases, 63; *Fenton* vs. *Hampton*, 11 Moore's P. C. C., 347; *Doyle* vs. *Falconer*, I Law Reports, 328.) It was denied that the House of Commons had this power as a necessity, but possessed it only from long use of it. In the case of *Kielley* vs. *Carson* a re-argument was ordered by the court, and it was re-argued before the Lord Chancellor, (Lyndhurst,) Lords Brougham, Denman, Abinger, Cottenham, and Campbell, the Vice-Chancellor of England, (Shadwell,) the Lord Chief-Justice of the Common Pleas, (Tindall,) Mr. Justice Erskine, Dr. Lushington, and Baron Parke; the latter delivered the opinion.

The original resolution of the House upon which the investigating committee was ordered, stated no case or subject-matter about which a legislative body has jurisdiction to inquire. It contemplated no legislation nor any legislative duty.

If it referred to anything or matter in which the United States or the public had any interest, such thing or matter was alleged to be judicial and then pending in the court, and not the subject of any legislative action. Nor had the legislative department any right to interfere therein.—(Cushing, §§ 611, 642, 640, 641, 648, 649, 1106, and 1107.)

The warrant for the bringing of the plaintiff before the House was issued in the first instance upon the report and recommendation of the committee, and without any adjudication of the House that its privileges had been violated or any contempt committed. This first arrest was therefore unlawful, and constituted a tort for which the defendants are liable. In the case of *Dunn* vs. *Anderson*, from which the pleas in this case are taken, it is alleged that the contempt was adjudged before any arrest was made.

No court or officer can acquire jurisdiction by the mere assumption or assertion of it, or by falsely alleging the existence of facts on which jurisdiction depends.—(*The People* vs. *Cassells*, 5 Hill, N. Y., 164.)

The warrant on which the plaintiff was finally arrested and confined in the District jail did not authorize the sergeant-at-arms to *immediately* convey him to and confine him in the jail. It contemplated the taking of the plaintiff before the committee again—that he should have the privilege to appear and answer and obey the subpœna, and if he answered that he was not ready to so appear and answer, then he was to be "*recommitted.*" It is void on the face of it. It delegated a discretion to the sergeant-at-arms which is judicial, and which cannot legally be delegated to any mere ministerial or executive officer.—(*Geisse* vs. *Beall*, 5 Wis., 224.)

There is no law authorizing the House of Representatives to appropriate the District jail, or authorizing the sergeant-at-arms to confine persons convicted of contempts in the jail. The confinement was, therefore, illegal.

The right of self-defence is not denied. But self-defence does not allow of the invasion of the rights of others. It permits the removal of persons creating disturbances in the House and excluding them therefrom. The general laws are all-sufficient for the punishment of all crimes and offences. If they are not, Congress has ample power to make them so. The court say in *Anderson* vs. *Dunn* that the power of self-preservation is "*the least possible power adequate to the end proposed.*"—(6 Wheat., 62.) Certainly this cannot necessitate the summoning, examination, and punishment of witnesses; such power, therefore, does not, even according to this case, inhere in the House of Representatives, especially when such power so exercised must violate all the fundamental principles of our system of government.

It has been said that it is no reason against the exercise of this indefinite and discretionary power that it may be

abused; that it is even an *indecency* to suggest the possibility of its abuse by so respectable a body as the House of Representatives. That the power has been most flagrantly and repeatedly abused, granting its existence for the sake of the argument, is a fact—whatever the denunciation for knowing and expressing it.

Floyd's case in the British House of Commons, cited in May's Parliamentary Law, p. 91, and the case of Patrick Woods, in the House of Representatives, are instances. The latter was absolutely tried for assault and battery, condemned to imprisonment for three months, beyond even the session in which he was convicted, and the sentence was carried into execution.

But the liability, the *possibility of abuse*, without any mode of redress, a power so dangerous to the liberty of the citizen, was said by the court in the case of *Embry* vs. *The State* (107 Mass., 172), to be a powerful argument against the existence of the power in the legislative assembly. And yet it is provided by the constitution of the State of Massachusetts, "*That the House of Representatives shall have authority to punish by imprisonment every person not a member who shall be guilty of disrespect to the House, or by any disorderly or contemptuous behavior in its presence,*" *&c.*

The courts are all limited by law, by statutory provisions, in the punishment of contempts, to those which are committed in their presence. And yet the constitutional lodgment of judicial power in the courts alone would seem to justify the trusting them with the punishment of contempts in their discretion, much more than a legislative assembly, if it were fit or proper in our government of written constitution and laws to trust any department thereof with discretionary or despotic power.—(6 N. Y., 358; 15 Barbour, 539.) There is an ultimate responsibility and accountability of the judges for any usurpation or wrong they may commit. They may be impeached; and they act at all times under the sense of this accountability and responsibility. Their victims may be reached by the pardoning power.

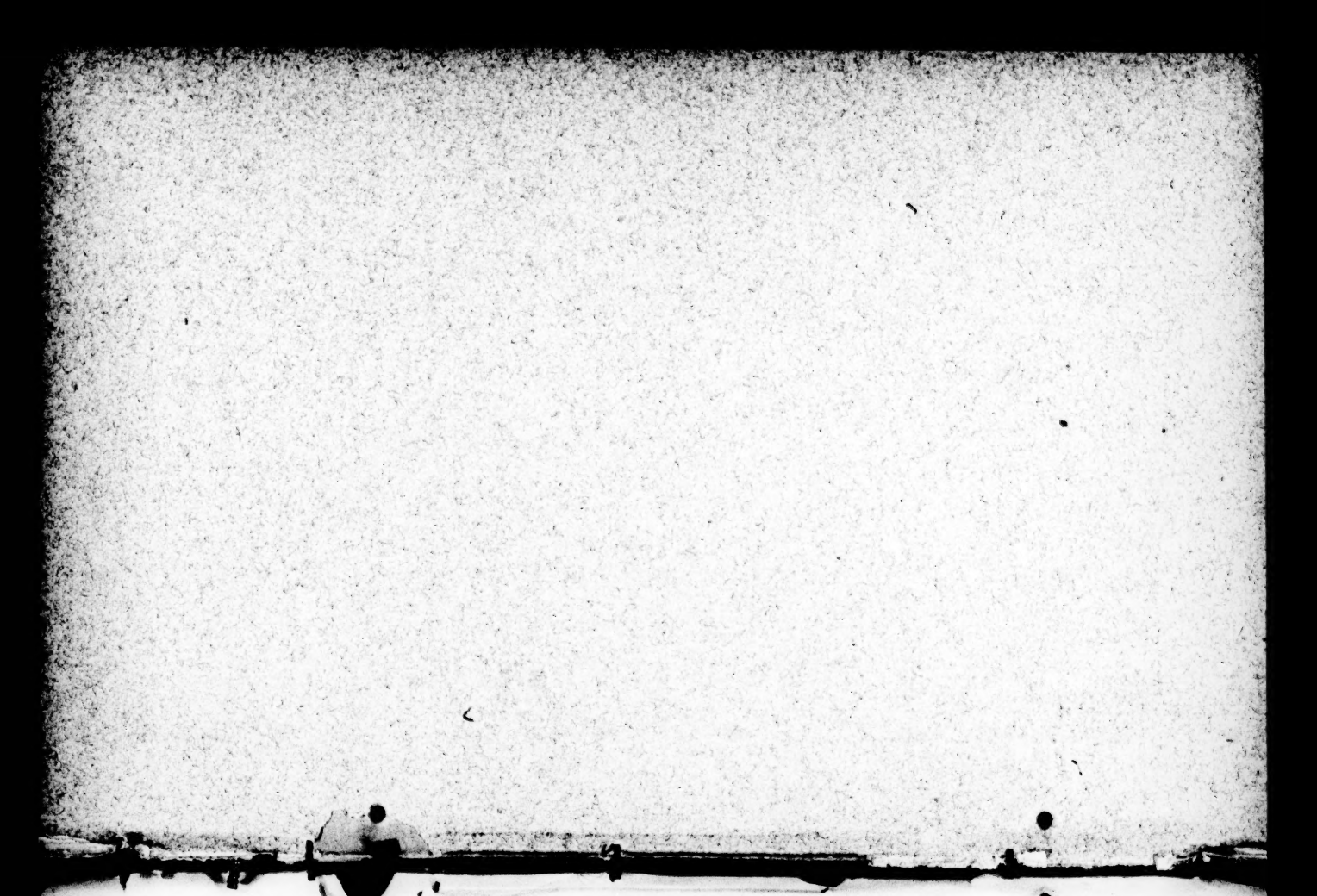
But if the House of Representatives has this unbounded jurisdiction of discretion, there is no redress. The House may despoil any citizen of his life, liberty, or property, and there is no power on earth to stay its hand. There is no redress.

There is—there can be—no such unlimited power in any department of the government of the Republic.—(*Loan Association* vs. *Topeka*, 20 Wallace, 662–3; 4 Hill, N. Y., 140; Sedgwick on Statutory and Constitutional Law, 215.)

The citations that even the House of Commons is not a court, and that it requires the concurrence of the "*three estates*" to create any *new* privilege in either house of Parliament, and that many of the pretensions of the Commons are without authority of law, based upon and grown out of a mere dicta of Lord Ellenborough, will be found in the case of *Stockdale* vs. *Hansard*, 36 E. C. L., 91, 92, 104, 106, 111, 118, 119, 120, and 128. That the House of Commons is a court in any true sense is indignantly denied by Lord Denman in his opinion.

It is, therefore, submitted that the judgment of the Supreme Court of the District of Columbia ought to be reversed.

CHARLES A. ELDREDGE,
ENOCH TOTTEN,
For Plaintiff in Error.



IN THE

Supreme Court of the United States

No. 144—OCTOBER TERM, 1879.

HALLETT KILBOURN,
Plaintiff in Error,

vs.

JOHN G. THOMPSON ET AL.,
Defendants in Error.

Brief for Plaintiff in Error.

N. L. JEFFRIES,
for Plaintiff in Error.

WASHINGTON, D. C.
GIBSON BROTHERS, PRINTERS.
1880.

In the Supreme Court of the United States.

October Term, 1879.

HALLETT KILBOURN, PLAINTIFF IN ERROR,

vs.

JOHN G. THOMPSON ET AL., DEFENDANTS IN ERROR.

No. 144.

BRIEF FOR PLAINTIFF IN ERROR.

This is an action of trespass for assault and imprisonment. The pleas justify on the ground that the acts complained of were authorized by the House of Representatives, for the alleged reason that the plaintiff refused to answer a pertinent question put by a committee of investigation, and to produce certain records.

To these pleas the plaintiff demurred, the supreme court of the District of Columbia overruled the demurrer, and gave judgment for the defendants, whereupon the plaintiff sued out a writ of error, and removed the cause to this court for review.

ASSIGNMENT OF ERROR.

The court below erred in overruling the demurrers, and in holding that the matters and things alleged in the said special pleas constituted a defence to the plaintiff's action.

STATEMENT OF THE CASE.

On the 24th day of January, 1876, the House of Representatives adopted the following resolution:

"Whereas the government of the United States is a creditor of the firm of Jay Cooke & Company, now in bankruptcy, by order and decree of the District Court of the United States in and for the Eastern District of Pennsylvania, resulting from the improvident deposits made by the Secretary of the Navy of the United States with the London branch of said house of Jay Cooke & Company, of the public moneys; and, whereas, a matter known as the Real-Estate Pool was only partially inquired into by the late joint select committee to inquire into the affairs of the District of Columbia, in which Jay Cooke & Company had a large and valuable interest; and, whereas, Edwin M. Lewis, trustee of the estate and effects of said firm of Jay Cooke & Company, has recently made a settlement of the interest of the estate of Jay Cooke & Company, with the associates of said firm of Jay Cooke & Company, to the disadvantage and loss, as it is alleged, of the numerous creditors of said estate, including the government of the United States; and, whereas, the courts are now powerless by reason of said settlement to afford adequate redress to said creditors:

"*Resolved*, That a special committee of five members of this House, to be selected by the Speaker, be appointed to inquire into the nature and history of said Real-Estate Pool and the character of said settlement, with the amount of property involved in which Jay Cooke & Co. were interested, and the amount paid or to be paid in said settlement, with power to send for persons and papers, and report to this House."

Thereupon a *subpœna duces tecum* was issued, and the plaintiff appeared and testified before the committee, and among other things was interrogated as follows:

"*Question.* Will you state where each of the five members reside, and will you please state their names?"

"*Question.* Mr. Kilbourn, are you now prepared to produce, in obedience to the *subpœna duces tecum*, the records which you have been required by the committee to produce?"

The plaintiff refused to answer the questions, and also refused to produce the records. The committee reported his refusal to the House; he was arrested and brought to its bar, and on again refusing he was declared to be in contempt of the House, which thereupon passed the following resolutions:

"1. *Resolved*, That Hallet Kilbourn having been heard by the House, pursuant to the order heretofore made requiring him to show cause why he should not answer questions propounded to him by a committee and respond to the *subpœna duces tecum* by obeying the same, and having failed to show sufficient cause why he should not answer said questions and obey said *subpœna duces tecum*, be and is, therefore, considered in contempt of said House because of said failure."

"2. *Resolved*, That in purging himself of the contempt for which Hallet Kilbourn is now in custody, the said Kilbourn shall be required to state to the House whether he is now willing to appear before the committee of the House to whom he has hitherto declined to obey a certain *subpœna duces tecum*, and answer certain questions, and obey said *subpœna duces tecum*, and make answer to said questions, and if he answers that he is ready to appear before said committee and obey said *subpœna duces tecum* and answer said questions, then said witness shall have the privilege to so appear, and obey, and answer forthwith, or so soon as said committee can be convened, and that in the mean time the witness remain in custody, and in the event that said witness shall answer that he is not ready to so appear before said committee and obey said *subpœna duces tecum*, and make answer to said questions as aforesaid, then that said witness be recommitted to the said custody for the continuance of said contempt, and that such custody shall continue until the said witness shall communicate to this House through said committee that he is ready to appear before said committee and make such answer and obey said *subpœna duces tecum*, and that in executing this order the Sergeant-at-Arms shall cause the said Kilbourn to be kept in his custody in the common jail of the District of Columbia."

On the same day, (March 14, 1876,) the Speaker issued his warrant, as follows:

CONGRESS OF THE UNITED STATES,
In the House of Representatives, March 14, 1876.

TO JOHN G. THOMPSON, ESQ.,
Sergeant-at-Arms of the House of Representatives:

SIR: The following resolution has this day been adopted by the House of Representatives:

"*Resolved*, That in purging himself of the contempt for which Hallett Kilbourn is now in custody, the said Kilbourn shall be required to state to the House whether he is now willing to appear before the committee of this House to whom he has hitherto declined to obey a certain *subpœna duces tecum* and answer certain questions, and obey said *subpœna duces tecum* and make answer to said questions; and if he answers that he is ready to appear before said committee and obey said *subpœna duces tecum* and answer said questions, then said witness shall have the privilege to so appear and obey and answer forthwith, or so soon as said committee can be convened; and that in the meantime the witness remain in custody; and, in the event that said witness shall answer that he is not ready to so appear before said committee and obey said *subpœna duces tecum* and make answer to said questions as aforesaid, then that said witness be recommitted to the said custody for the continuance of such contempt; and that such custody shall continue until the said witness shall communicate to this House, through said committee, that he is ready to appear before said committee and make such answer and obey said *subpœna duces tecum;* and that in executing this order the Sergeant-at-Arms shall cause the said Kilbourn to be kept in his custody in the common jail of the District of Columbia."

Now, therefore, you are hereby commanded to execute the same accordingly.

In witness whereof, I have hereunto set my hand and caused the seal of the House of Representatives to be affixed the day and year above written.

[SEAL.] M. C. KERR,
Speaker.

Attest: GEORGE M. ADAMS,
Clerk.

On the receipt of this warrant the Sergeant-at-Arms con-

veyed the plaintiff to the common jail of the District of Columbia, and detained him there for a period of forty-five days, and until he was released by order of the Chief-Justice of said District on *habeas corpus*.

ARGUMENT AND AUTHORITIES.

The imprisonment of the plaintiff was unlawful, because:

I. Conceding (for the sake of the argument) the power of the House of Representatives to order the arrest and imprisonment of the plaintiff, its order in this case was that he be imprisoned in the event that upon being required to answer he should refuse. The order was conditional; the condition was to be performed by the House or its agent. "He shall be required to state to the House whether he is now willing to appear before the committee of this House, * * * and answer certain questions, and obey said *subpœna duces tecum*, and make answer to said questions," is the language of the Speaker's warrant—the text of the order of the House. If he declared his willingness to answer, he was to appear before the committee and do so; but, says the resolution, "in the event that said witness shall answer that he is not ready so to appear before said committee and obey said *subpœna duces tecum*, and make answer to said questions as aforesaid, then that said witness be recommitted to the said custody for the continuance of such contempt, * * * and that in executing this order the Sergeant-at-Arms shall cause the said Kilbourn to be kept in his custody in the common jail of the District of Columbia."

There is no allegation in the pleas, nor is it true in fact, that this condition precedent was performed. On the contrary, instead of requiring the plaintiff "to state to the House whether he was now willing to appear before the committee of the House to whom he has hitherto declined to obey a certain *subpœna duces tecum*, and answer certain questions and obey said *subpœna duces tecum*, and make answer to

said questions," as the resolution of the House and the warrant of the Speaker directed, the Sergeant-at-Arms sets forth in his plea that, upon the receipt of said warrant, he "went to the said Hallet Kilbourn, and then and there gently laid his hands on the said Hallet Kilbourn to arrest him, and did then and there arrest him by his body, and take him into custody, and *forthwith* convey him to the common jail of the District of Columbia, and did keep him in custody therein until the 18th day of April, 1876."

2.—WERE THE QUESTIONS PERTINENT AND MATERIAL?

It is alleged in the pleas that the questions which the plaintiff refused to answer "were pertinent and material to the said question of inquiry before the said committee."

In order to determine whether the questions were pertinent or material it is necessary to understand what that inquiry was.

The committee was instructed "to inquire into the nature and history of said Real-Estate Pool, and the character of the settlement made by the trustee of Jay Cooke & Co. estate in bankruptcy, "with the amount of property involved, in which Jay Cooke & Co. were interested, and the amount paid or to be paid on said settlement."

The precise questions which the plaintiff refused to answer were as follows:

1. "Will you state where each of the five members reside and will you please state their names?"
2. "Mr. Kilbourn, are you now prepared to produce, in obedience to the *subpœna duces tecum*, the records which you have been required by the committee to produce?"

There is nowhere in the record any definition or explanation of what is intended by the phrase "Real-Estate Pool." If the words are taken in their common acceptation the phrase itself is meaningless.

But, assuming that it was an association of members hold-

ing or dealing in real estate, the fact would appear of record; for under the statute of frauds it could not otherwise exist, and the record was the proper evidence and not the answer of the witness.

The *subpœna duces tecum* required the plaintiff to produce certain "records, papers, and maps," and it is alleged that he refused to bring with him the records; there is no allegation that he refused to produce the maps and papers.

What the records were is nowhere stated, except that they "related to the inquiry" which was in reference to the real-estate pool; and it is likely the records were title-deeds, or other record evidence of the title or interest of the members of the real-estate pool, and as such were distinguished from "papers and maps."

If an inspection of these records were necessary the committee could have obtained certified copies from their legal custodian, the register of deeds; this would have been legal testimony.

There is no allegation that the plaintiff had possession or control of said records, or that it was possible for him to produce them.

If this record referred to any settlement of Jay Cooke & Co.'s bankrupt estate, its custodian was the clerk of the court which had approved such settlement, viz: the United States District Court for the Eastern District of Pennsylvania.

The questions put by the committee were: 1. "Will you state where each of the five members reside, and will you please state their names?" And the pleas allege that the plaintiff "did knowingly and wilfully refuse to answer the said question."

2. "Mr. Kilbourn, are you now prepared to produce, in obedience to the *subpœna duces tecum*, the records which you have been required by the committee to produce?" And the pleas allege that the plaintiff "knowingly and wilfully *refused to produce said records.*"

On this refusal, the committee reported that it was neces-

sary that the plaintiff should answer and produce the records, and that his refusal was in contempt of the House.

There is no averment in the pleas stating whether or not this report was adopted by the House, but it is alleged that the House, "for good and sufficient cause," without stating what that was, or without any averment in the pleas as to said cause, ordered the Speaker to issue his warrant to the Sergeant-at-Arms for the arrest of the plaintiff, and to have his body before said House at the bar thereof, to show cause why he should not be punished as guilty of contempt.

The warrant was issued, the plaintiff was arrested, and brought before the House.

Up to this time the plaintiff, while charged with being in contempt, had not been convicted of the offence, and it was at this point that the House took jurisdiction of the person of the plaintiff who was before it, in custody by its order, and also assumed jurisdiction of the subject-matter, and proceeded to inquire of the witness, through its Speaker, as follows: "Mr. Kilbourn, are you now prepared to answer, upon the demand of the proper committee of the House, where each of the five members reside?" And the pleas allege that "the said Hallett Kilbourn did knowingly and wilfully refuse to answer the said question," &c.

It will be observed that this is only a part of the question put by the committee; that question, in addition to the residence, called for the names of the five members.

The Speaker then asked of the plaintiff the following: "Are you (meaning the said Kilbourn) prepared to produce, in obedience to the *subpœna duces tecum*, the records which you have been required by the committee to produce?" And it is averred that "the said Hallett Kilbourn did knowingly and wilfully *decline and refuse to produce the said records*," &c. For *this* refusal he was convicted, sentenced, and imprisoned.

Now, what was that refusal? The question was: "Mr. Kilbourn, are you *now prepared to answer*, upon the demand of the proper committee of the House, where each of the five members reside?" He was not asked, "Where do each of

the five members reside?" but whether or not, at that moment, he was prepared to furnish the information as to their residence; and it is said he refused to answer the question. Whether he refused to give the information, or refused to say whether or not he was prepared to give it, is not explained. It will be observed that the names of the five members were not regarded by the House as essential to the inquiry, or it had already obtained them, as that branch of the committee's question was not put by the House.

The second question related also to the fact as to whether or not the plaintiff *was prepared* to furnish the records. But in this instance it is not alleged that he refused *to answer the question*, but that he refused to produce said records, which was precisely what he was not asked to do; in other words, he was asked by the Speaker one thing, and the pleas allege that he refused to do some other thing! And upon this refusal swift conviction and punishment followed. He was "recommitted" to the Sergeant-at Arms, and "forthwith confined in the jail of this District."

3.—THE PLAINTIFF NOT SWORN AS A WITNESS.

It required more than a *subpœna* and the appearance of the plaintiff on the stand to give the committee or the House jurisdiction over him as a witness. Before interrogating him, it was the duty of the chairman of the committee to administer to him an oath; until then, he had not assumed the attitude or character of a witness, nor could he be required to answer.

It does not appear that this was done, but the plaintiff "in obedience to said *subpœna* appeared before the said committee, and was examined by said committee in relation to the prosecution of the inquiry which they (the said members of the committee) were ordered and commanded to make and prosecute, under and by force of the above-cited resolution, and during the said examination the said Hallett Kilbourn was asked the following questions:"

The House assumed judicial power, it tried and condemned the plaintiff for refusing to answer as a witness when he was not a witness, no oath or affirmation having been administered to him. True, it does not appear that he refused to answer because he had not been sworn, neither does the contrary appear.

4.—HAD THE HOUSE JURISDICTION OF THE SUBJECT-MATTER.

It will be conceded that if the investigation by the committee related to matters between private individuals, and concerned no public matter, or the action of any officer of the Government, there would be no warrant for the power exercised. Neither could the House acquire jurisdiction of a private matter by erroneously stating that the interest of the United States was in some way involved.

There is no averment in the pleas that the subject-matter to be investigated related in any way to any public matter, or in any way concerned the Government of the United States, or any officer thereof.

The preamble to the resolution of inquiry sets forth the grounds upon which the investigation is ordered, that "Whereas the Government of the United States is a creditor of Jay Cooke & Co., resulting from improvident deposits of the public money in the London branch of said house of Jay Cooke & Co. by the Secretary of the Navy." This could not be true, for it is a well-known historical fact that the house of Jay Cooke & Co. had no London branch.

If, then, there was error in this statement of a material fact, if it should turn out that the moneys were deposited with another and different banking-house in London—with the house of Jay Cooke, McCulloch & Co., for instance—such false assertion would not aid the House in acquiring jurisdiction.

The ground upon which the jurisdiction was claimed was that Jay Cooke & Co. were indebted to the Government, and that they had an interest in the Real-Estate Pool which had

been extinguished by a settlement made by the trustee of their bankrupt estate. The statement, therefore, that the United States was a creditor of Jay Cooke & Co. was material to the jurisdiction of the subject-matter, but was not true.

In the case of the *People* vs. *Cassels*, (5 N. Y.,) the court said: "No court or officer can acquire jurisdiction by the mere assertion of it, or by falsely alleging the existence of facts on which the jurisdiction depends." In reviewing *Burdett* vs. *Abbott*, Lord Camden said:

"Where the subject-matter falls within their (the Commons) jurisdiction, no doubt we cannot question their judgment; but we are now inquiring whether the subject-matter does fall within the jurisdiction of the House of Commons.

"It is contended that they can bring it within their jurisdiction by declaring it so. To this claim, as arising from their privileges, I have already stated my answer: It is perfectly clear that none of these courts could give themselves jurisdiction by adjudging that they enjoy it."

Stockdale *vs.* Hansard, 9 Adolphus & Ellis, 129.

The preamble then goes on to state that M. Lewis, trustee of the bankrupt estate of Jay Cooke & Co., had recently made a settlement "of the interest of the estate of Jay Cooke & Co. with the associates of said firm of Jay Cooke & Co., to the disadvantage and loss, *as it is alleged*, of the numerous creditors of said estate, including the Government of the United States."

Touching the allegation that Jay Cooke & Co. had had an interest in the Real-Estate Pool, it is only necessary to say that the private business of Jay Cooke & Co. was not within the scope of Congressional investigation, and if the trustee had made a settlement of the interest of Jay Cooke & Co., that settlement had to pass under the scrutiny of the court of proper jurisdiction, whose judgment is not subject to review by the House of Representatives or Congress. If the Government of the United States, with other creditors, sustained loss on account of the settlement, it should have

resisted it before the tribunal authorized to adjudicate and determine that question.

The concluding paragraph of the preamble sets forth that "Whereas the courts are now powerless, by reason of said settlement, to afford adequate redress to said creditors," which means that the settlement is final, that the rights of the several parties have become vested, and beyond the reach of legal process. If this be true, upon what principle could the House of Representatives or Congress intervene?

This is the basis of the investigation; there was no affidavit or sworn statement set forth or referred to in support of the allegations of the preamble. On the other hand, it is averred that the settlement was "to the disadvantage and loss, *as it is alleged*, of the creditors," &c., and upon the frail foundation of a hearsay plaintiff was taken before the committee and required to exhibit his private business. Can it be possible that, without laying some proper foundation, or requiring some *prima facie* showing or probable cause, the House had the right to say to the plaintiff, "Let us search your papers for our information," and on his refusal, imprison him?

Denying the right, he refused to answer—refusing, as was his right, when the House sought to wrest from him that which was his own—the secrets of his private business, the custody of his private papers.

Why not send its Sergeant-at-Arms and break open his doors and seize his books and papers? There are plenty of English precedents for that; and what is the difference whether his papers are "seized," or his person is seized and imprisoned until he produces them? The witness having answered fully all that was inquired of him touching the interest of Jay Cooke & Co. in the Real-Estate Pool, the investigation took another turn, and the interests of *other parties* in that transaction became the subject of inquiry; the witness refused to disclose the names of these parties, his associates in this private transaction, or to produce his books and papers for that purpose; and for *that refusal* he was seized and im-

prisoned. Without probable cause, without affidavit, he was confined in the common jail, because he refused to disclose a private matter in which the Government had no conceivable interest, in which he alone and his associates were concerned.

The 4th article of the amendments to the Constitution provides:

"The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, *shall not be violated*, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Here is a constitutional inhibition that all courts, legislative bodies, governmental departments, and officers must obey. The House, acting in whatever capacity it may assume, has no power to seize the person of a citizen or his papers, or make an unreasonable search, except upon probable cause, supported by oath or affirmation.

The right to be secure from search or seizure is a constitutional right, expressly guaranteed by the 4th amendment to the Constitution.

As I have already said, the seizure of the person and his imprisonment as a means of coercing him to reveal his private business transactions that do not in any manner concern the public, or to produce private books and papers in which the Government has no interest, without laying a foundation in some way connecting the transaction with some fraud or wrongful act against the Government of the United States, or with some public matter which Congress or the House may investigate, or without accusation under oath tending to sustain such charge, is an obvious violation of this constitutional provision.

In this case there was no statement, sworn or unsworn, that the transaction known as the Real-Estate Pool involved the

official conduct of any public officer, or was in any way connected with any public matter. So far as this record discloses the facts, the Real-Estate Pool, so called, is a private business matter, concerning the parties in interest, and no other person or persons, and is no more the lawful subject of investigation by Congress than the private business of Messrs. Galt & Bros., or Perry & Bro., or any other of our respected leading merchants of this city, are subject to Congressional investigation. Therefore, if it be decided that the private business of this plaintiff may be investigated, his books and private papers examined, and his refusal to submit is an offence punishable by imprisonment, what has become of the protection which every citizen supposed he enjoyed under the constitutional guaranty which declares that the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated?

In *ex parte* Lange, (18 Wall., 163,) the Supreme Court say:

"There is no more sacred duty of a court than, in a case properly before it, to maintain unimpaired those securities for the personal rights of the individual which have received for ages the sanction of the jurist and the statesman; and in such cases no narrow or illiberal construction should be given to the words of the fundamental law in which they are embodied."

Keeping in mind this rule which the Supreme Court has laid down as a guide in construing the Constitution where questions arise as to "the personal rights of individuals," will it be claimed that unreasonable seizures and searches are prohibited, and that the right of the people to be secure in their persons, houses, papers, and effects shall not be violated, but that if one of the people refuses to deliver up his private papers to a committee of the House, he may be imprisoned in the common jail until he consents to produce them? Is that what is intended by the clause I have just quoted, in which it

is said that the right of the people to be secure in their persons and papers shall not be violated?

The House has said to Mr. Kilbourn, We will have your papers or your liberty. You shall reveal to us the secrets of your private business or go to jail. The Constitution declares that he shall be secure in his person and papers, and that no warrant shall issue except upon probable cause, supported by oath or affirmation. Where was the probable cause, *supported by oath or affirmation*, upon which the Speaker's warrant was issued? Who has made oath or affirmation that this transaction is not strictly and completely private, or that the books and papers are in any way connected with any public matter? I maintain, therefore, that this extraordinary demand upon this plaintiff was in violation of the 4th amendment to the Constitution, and that his refusal was in vindication of his constitutional right, and the order of the House and its execution was void, because it was in contravention of the Constitution.

When the House of Representatives is clothed with the omnipotent power of Parliament, when the judicial power of the Government has been transferred from the judicial department to the House of Representatives, when that House is authorized to do in its individual capacity what both Houses, with the concurrence of the Executive, is now prohibited from doing, we can apply the reasoning of counsel who have labored so eloquently and so long in defence of this usurpation.

In listening to this eloquent defence of the House of Representatives, we are insensibly carried back to the golden era of parliamentary supremacy, when "privilege" and prerogative bore undisputed sway; to the days of the Convention's parliament, when the Commons declared their absolute sovereignty, and assumed the power of making laws in defiance of the Peers and the Throne; when it was the fashion to cut off the ears, as in Prynn's case, or the nose, as in Coventry's case, or to search the secret closet for treasonable

matter, and murder judicially the author of a private manuscript composed in the retirement of his home, as in Sidney's case; when judges were brought to the bar of the Commons, reprimanded, and sent to Newgate, for daring to question the privileges of the Commons, as in Pemberton's and Jones's case. These were the halcyon days of privilege, and their fruits are the precedents which have graced and ornamented the eloquent appeals of counsel in behalf of the House of Representatives of the 44th Congress for arresting a citizen without warrant and imprisoning him without law.

It is said that the House of Representatives is a court, and having jurisdiction of the subject-matter its judgment is final and conclusive; therefore the courts of the United States will not consider whether a citizen is deprived of his liberty lawfully or unlawfully, if it appear that the imprisonment is by order of the House. That, as I understand it, is the proposition here.

If the House is a court, it is necessarily a criminal court, for it has no power to render a money judgment or to enforce its payment by execution if it assumed the power.

As a criminal court, it assumes to try offences in a way not known to the Constitution. It has no jury, no indictment, information, or affidavit. In case of conviction, if it impose a fine, it cannot enforce its judgment; it can inflict but one penalty—imprisonment.

Unlike ordinary courts, it not only tries, but it creates the offence at the same time. The accused has no means of knowing whether he is guilty or not guilty; he cannot even plead, for the offence for which he is on trial has never been declared; and how can he answer to a charge of violating a law or rule of the House that has not yet been promulgated? The theory is that after an act has been committed, the House, upon due consideration, determines whether or not that particular act is a contempt. If a majority decide the act is a contempt, the punishment follows; the penalty is prescribed after the act is committed. At what point in this proceeding does the trial take place?

My understanding is that a court is "a place wherein justice is judicially administered." Where the laws that have been previously enacted and promulgated are administered and enforced; not where the laws are made, but where those previously enacted are construed and administered.

The judicial power of the United States being vested in the Supreme Court and such inferior courts as Congress may from time to time establish, and Congress never having passed any law declaring the House of Representatives a court—if it had the power, which it has not, any more than it has to convert the Supreme Court into a legislative body, or to change the nature, character, and functions of any of the co-ordinate branches of the Government, each of which has its well-defined sphere of action prescribed by the Constitution—it is necessarily just what the Constitution declares it to be, nothing more and nothing less—a legislative body, and not a court.

In *ex parte Randolph*, which was a *habeas corpus* in behalf of Randolph, who was imprisoned under a warrant of distraint, issued by the Solicitor of the Treasury, under the act of May 15, 1820, Chief-Justice Marshall, in delivering the opinion of the circuit court, said:

"If this ascertainment of the sum due to the Government, and this issuing of process to levy the sum so ascertained to be due, be the exercise of any part of the judicial power of the United States, the law which directs it is plainly a violation of the first section of the third article of the Constitution, which declares that 'the judicial power of the United States shall be vested in one supreme court, and in such inferior courts as Congress shall from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior.' The judicial power extends to controversies to which the United States shall be a party."

"The persons who are directed by the act of Congress to ascertain the debt due from a delinquent receiver of public money, and to issue process to compel the payment of that debt, do not compose a court ordained and established by

Congress, nor do they hold offices during good behavior. Their offices are held at the pleasure of the President of the United States. They are consequently incapable of exercising any portion of the judicial power, and the act which attempts to confer it is absolutely void."

Here there was an adjudication, a finding by an officer charged with that duty, process issued upon that finding, and imprisonment followed in execution of it; yet it was held that it was a usurpation of judicial power.

But conceding, for the sake of the argument, that it is both a legislative body and a court, like the Senate, which trys all cases of impeachment, but which before proceeding to try is required to be sworn, and when the President is impeached the Chief-Justice is required to preside, and even then its power to punish is limited to removal from and disqualification from holding office—what, then, is the extent of its jurisdiction, and what is the remedy if that jurisdiction is exceeded?

I have undertaken to show that the imprisonment in this case is a violation of the Fourth Amendment to the Constitution. That the House of Representatives has no more power to investigate a man's private business than a justice of the peace has that power.

What, then, is the remedy when the House deprives a citizen of his liberty in plain violation of the Constitution? Is there no redress? Is it claimed that the House is not only a court, but that it is a court that can violate the Constitution at its option? That would seem to be the logic of its advocates.

Suppose, instead of imprisoning Mr. Kilbourn, they had banished him, or had sequestered his estate, or imprisoned him without food, or sentenced him to be imprisoned until the end of the session and then executed him—I think there are English precedents for all these—why would not that be within the power of the House, if its jurisdiction may not be questioned?

If it be true, as is claimed by counsel, that where a final judgment has been rendered by one court having jurisdiction of the offence no other court has power to intervene, then any one of the penalties I have enumerated might be inflicted.

Suppose a justice of the peace, in an action of forcible entry and detainer or trespass, should sentence a defendant to be divorced from his wife, or to be imprisoned for life in the penitentiary, would there be any question as to the illegality of the judgment, notwithstanding he had jurisdiction of the subject-matter?

In *ex parte* Lange, (18 Wall., 163,) the Supreme Court on *habeas corpus* released the relator from imprisonment, who was in execution of final sentence by the district court, that court having jurisdiction of the offence for which he was convicted. The court say:

"It is no answer to this to say that the court had jurisdiction of the person of the prisoner and of the offence under the statute. It by no means follows that these two facts make valid, however erroneous it may be, any judgment the court may render in such case. If a justice of the peace, having jurisdiction to fine for a misdemeanor, and with the party charged properly before him should render a judgment that he be hung, it would simply be void. Why void? Because he had no power to render such a judgment. So, if a court of general jurisdiction should on an indictment for libel render a judgment of death or confiscation of property, it would, for the same reason, be void. Or, if on an indictment for treason the court should render a judgment of attaint, whereby the heirs of the criminal could not inherit his property, which should by the judgment of the court be confiscated to the State, it would be void as to the attainder, *because in excess* of the authority of the court, and forbidden by the Constitution." (*Ex parte* Lange, 18 Wall., 163.)

In that case, Lange, the relator, had been indicted, convicted, sentenced, and imprisoned by the United States district court for a criminal offence, exclusively within the jurisdiction of that court, and upon *habeas corpus* was discharged by the Supreme Court of the United States.

The unlawful exercise of this jurisdiction by the House cannot legalize acts done under it. If it has acted without jurisdiction, its acts are *coram non judice* and void.

Neither can the House acquire jurisdiction by asserting it; nor can it enlarge or extend its own jurisdiction by its own acts; nor can it acquire jurisdiction by assuming facts which are not true on which the jurisdiction depends.

"No court or officer can acquire jurisdiction by the mere assertion of it, or by falsely alleging the existence of facts on which jurisdiction depends." (*The People* vs. *Cassels.*)

In reviewing *Burdett* vs. *Abbott*, Lord Camden said:

"The grounds of the decision were, not that all acts done by their (the Commons) authority were beyond the reach of inquiry, or that all which they called privilege was privilege and sacred from the intrusion of law, but that they had acted in exercise of a known and needful privilege in strict conformity with law." (*Stockdale* vs. *Hansard*, 9 Adolphus and Ellis, p. 1.)

And again:

"Where the subject-matter falls within their (the Commons) jurisdiction, no doubt we cannot question their judgment; but we are now inquiring whether the subject-matter does fall within the jurisdiction of the House of Commons.

"It is contended that they can bring it within their jurisdiction by declaring it so. To this claim, as arising from their privileges, I have already stated my answer: It is perfectly clear that none of these courts could give themselves jurisdiction by adjudging that they enjoy it," (*ib.*, 147, 148.)

In *Burnham* vs. *Morrisey*, (14 Gray, 226,) the court say: "The House of Representatives is not the final judge of its powers and privileges in cases in which the rights and liberties of the subject are concerned; but the legality of its action may be examined and determined by this court. That House is not the Legislature, but only a part of it, and is,

therefore, subject in its action to the laws, in common with all other bodies, officers, and tribunals within the Commonwealth. Especially is it competent and proper for this court to consider whether its proceedings are in conformity with the Constitution and laws, because, living under a written constitution, no branch or department of the Government is supreme; and it is the province and duty of the judicial department to determine, in cases regularly brought before them, whether the powers of any branch of the Government, and even those of the Legislature in the enactment of laws, have been exercised in conformity with this Constitution, and if they have not been, to treat their acts as null and void."

In *Emery's* case (107 Mass., 172) the supreme court of Massachusetts said: "That any person held in custody of either branch of the legislature is entitled to have the cause of his imprisonment examined by the supreme judicial court upon *habeas corpus* is fully settled by the case of of *Burnham* vs. *Morrisey*," (14 Gray, 226.)

The court goes on to say:

"No one will contend, of course, that the legislature is not limited in its powers by the provisions of the Constitution equally with all other departments of the Government and the whole body of the Commonwealth, whether undertaken to be exercised in the ordinary form of law enacted, or by the orders and requirements which are incidental to its functions, and are adopted as a means of their performance. There is nothing in the terms of the article in question to except legislative bodies from its operation.

"The nature and purpose of the provisions are equally applicable to investigations conducted by the legislature itself, or by one of its branches, or by a committee of its own members, as when conducted before the courts, or by commissioners, or other tribunals established by law. Such tribunals can in no case disregard this rule of protection."

In *Falvey* vs. *Massing*, (7 Wisconsin, 630,) the Supreme Court said:

"The counsel who opened the argument for petitioner seemed to anticipate that some question might be made as to the right and power of this court to inquire into the authority of the body instituting the proceedings in the progress of which the commitment was made, and determine whether that body had or had not exceeded its jurisdiction in the premises; but I did not understand that this power of the court was seriously questioned by the counsel for the respondent. At all events I do not think that the contrary doctrine could be successfully maintained. Upon principle it would seem clear that when this court issued the writ of *habeas corpus* to inquire into the cause of the imprisonment of a citizen of a State, it must from necessity have the right further to inquire into the matter, and determine whether the committing body, the magistrate, had jurisdiction or not. Otherwise the issuing of the writ would be an idle ceremony and really to no purpose. But this question has been settled, as well by the authorities as by the express provisions of the statute.

"Assuming then without further argument the proposition that this court has the power to inquire into the authority of the legislature to enter upon the investigation of the matters named in the joint resolution, we are next to determine whether the subject-matter of this resolution was a proper subject for the investigation of the legislature, and, if so, whether the investigation could be made in the manner contemplated by the resolution; for it would seem to follow as a necessary consequence that, if the legislature could enter upon the investigation at all in the matter proposed, in order to make such investigation effectual there must be some way of compelling the attendance of witnesses before the committee and to give evidence."

The principle decided in these cases applies here; it asserts the power of the court "to consider whether the proceedings of the House are in conformity with the Constitution and laws;" and the same principle obtains in the more recent English decisions, where it is held that the courts of Westminster Hall may inquire whether the House of Commons, in the exercise of its privilege, had acted in strict conformity with law.

It has been said that the imprisonment of petitioner is not punishment; that he is only detained until he consents to testify and produce his books and papers. This is the argument of the Spanish Inquisition. That tribunal punished because its victims refused to testify. Whether it was the dungeon or the rack, the object sought was testimony. They were detained until they were willing to testify.

The power that can limit the prison fare to a dollar a day can reduce it to ten cents, or to bread and water. If that will not accomplish the object, then the boot and the thumb-screw may be applied. Why not? If the matter is wholly in the discretion of the House, and its power and jurisdiction cannot be questioned, what is to prevent it from inflicting whatever torture that may, in its judgment, be necessary to secure this testimony?

I understand that the House assumes to take jurisdiction of contempts in its judicial capacity; that it assumes to act as a court, and as such issues process, arrests, arraigns, tries, and pronounces sentence, and it is claimed by the House that this imprisonment is in execution of that sentence. If this be true, then it must also be true that the execution of a sentence is punishment.

"One of the modes by which the orders *or judgments* of a legislative assembly may be enforced is to bring the person refusing or disobeying to the bar, and there require him to submit himself to the assembly; and on his refusing, in their presence, so to do, *to punish him as for a contempt.*" (Cushing's Parliamentary Law, p. 265.)

So, in this case, the warrant of the Speaker ordering the arrest of the plaintiff by the Sergeant-at-Arms recites the order of the House authorizing the Speaker to direct the Sergeant-at-Arms to arrest the plaintiff "and bring him before the bar of the House to show cause *why he should not be punished for contempt.*"

It was claimed also that the jurisdiction was assumed on the

ground that it was proper for the House to look into the resources of the Government, to determine the amount of its revenues and of its appropriations, and therefore the investigation of the Real-Estate Pool was instituted by the House to ascertain what interest Jay Cooke and Company had in the so-called Real-Estate Pool, on the ground that Jay Cooke & Co. were indebted to Jay Cooke, McCullough & Co., who, it is claimed, were indebted to the Government, and the proceeding therefore justified on the ground that in making the necessary appropriations for the expenses of the Government for the ensuing fiscal year it was proper that the House should know what its resources were, and whether there was or not a fund in this Real-Estate Pool that might be available to the Government, and to that extent be applied to defraying its expenses.

Suppose, then, the committee had found that Jay Cooke and Company had an interest of one thousand or fifty thousand dollars in the Real-Estate Pool, or had discovered that the United States had an interest in the pool in a given sum, and the House had concurred and so decided, would the Committee on Appropriations have deducted that amount from the general or any other appropriation bill? If that could have been done in this instance, it could be done generally, and the amount appropriated would depend upon the amount of outstanding indebtedness due to the United States, not according to the books of the Treasury, but to the report of the investigating committees of the House.

The House not being a court it could render no judgment, it could not institute a suit, for that is a duty which pertains to the Executive branch of the Government; and a resolution of the House directing or advising the President to perform that or any other duty would be an interference as impertinent as an order to this court to decide a given case.

What I desire to make clear is, that the business of Congress is to make and repeal laws, and not to execute them; and that it is the duty of the Executive branch of the Government to take care of their execution.

The President is required to give, from time to time, information to Congress on the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient; but there is no reciprocal obligation on the part of Congress to instruct the President as to the proper discharge of his duties, or in case of his failure, for the House of Representatives to assume them.

Now, unless it be claimed that the House may investigate the private business of any and every citizen and compel him to disclose the privacy of his life, the amount of his earnings, the expense of his household, the advancement of his children, the allowance to his wife; the manner in which his income is derived, and the details of its expenditure; the condition of his bank account, whether he is solvent or insolvent, rich or poor, honest or dishonest, economical or extravagant; unless the House can do all this with no other motive than curiosity or a worse one, upon what pretext or foundation does the Real-Estate Pool investigation rest?

Such a wanton exercise of power is a violation of the Constitution, a disregard of law, an invasion of private right unknown to any other government where civil liberty is recognized and respected.

In response to a resolution of the House of Representatives, authorizing an inquiry into the condition of the various executive departments, the causes of complaint at the manner in which the duties of Government officers were performed, &c., the President of the United States said:

"The first proceeding of the investigating committee is to pass a series of resolutions, which though amended in their passages, were, as understood, introduced by you, calling on the President and the heads of the departments—not to answer any specific charge; not to explain any alleged abuse; not to give information as to any particular transaction; but, assuming that they had been guilty of the charges alleged, calls upon them to furnish evidence against themselves.

"After the reiterated charges you have made it would have been expected that you would have been prepared to reduce them to specifications, and that the committee would then proceed to investigate the matters alleged. But instead of this you resort to generalities even more vague than your original accusations, and in open violation of the Constitution and of that well-established and wise maxim, 'that all men are presumed to be innocent until proven guilty according to the established rules of law;' you request myself and the heads of the departments to become our own accusers, and to furnish the evidence to convict ourselves; and this call purports to be founded on the authority of that body in which alone, by the Constitution, the power of impeaching us is vested.

"The heads of departments may answer such requests as they please, provided they do not withhold their own time or that of the officers under their direction from the public business to the injury thereof; to that business I shall direct them to devote themselves in preference to any illegal and unconstitutional calls for information, no matter from what source it may come, or however anxious they may be to meet it.

"For myself, I shall repel all such attempts as an invasion of the principles of justice, as well as of the Constitution, and I shall esteem it my sacred duty to the people of the United States to resist them, as I would the establishment of a Spanish Inquisition."

"If, after all the severe accusations contained in the various speeches of yourself and your associates, you are unwilling, of your own accord, to bring specific charges, then I request your committee to call yourself and your associates, and every other member of Congress who has made the general charge of corruption, to testify before God and the country whether you or they know of any specific corruption or abuse of trust in the executive departments; and if so, what it is? If you are able to point to any case where there is the slightest reason to suspect corruption or abuse of trust, no obstacle which I can remove shall be interposed to prevent the fullest scrutiny by all legal means. The offices of all the departments will be opened to you, and every facility furnished for this purpose. I hope, sir, we shall at last have your charges, and that you will proceed to investigate them, not like an inquisition, but in the accustomed mode. If you

either will not make specific accusations, or if, when made, you attempt to establish them by making freemen their own accusers, you will not expect me to countenance your proceedings."

"In the short period which remains of my official duty, I shall endeavor, as I have heretofore endeavored, to fulfil the obligations of that oath of office by which I am engaged to the best of my ability to preserve, protect, and defend the Constitution of the United States; and for this and other reasons of the most solemn character, I shall, on the one hand, cause every possible facility, consistent with law and justice, to be given to the investigation of specific, tangible charges; and, on the other, shall repudiate all attempts to invade the just rights of the executive department, and of the individuals composing the same."

"If, after all your clamor, you will make no specific charges, or bring no proof of such as shall be made, you and your associates must be regarded by the good people of the United States as the authors of unfounded calumnies, and the public servants you have assaulted will, in the estimation of all honorable men, stand fully acquitted. In the mean time I cannot but express my astonishment that members of Congress should call for information as to the names of persons to whom contingent moneys are paid and the object of those payments, when there are six standing committees under the seventy-seventh rule of the House of Representatives, whose special duties are to examine annually into all the details of those expenditures in each of the Executive Departments. The like remark is applicable to some other branches of the information sought by you, ample details in respect to which are to be found in the reports laid before Congress, and now on your files, and to which I recommend you to have recourse.

"I am, respectfully, &c.,

"ANDREW JACKSON.

"To the Honorable Henry A. Wise, Chairman of the Investigating Committee of the abuses and corruptions charged against the Executive Departments."

That was a case where it was proposed to examine the conduct of public officers; this a case where it was proposed to examine the private business of a citizen who held no office and had no relation to the Government except citizenship.

The Constitution shielded his person and papers from seizure from all quarters whatsoever, except upon proceedings founded upon oath or affirmation. Now, can it be true that the right to do this act is conferred on the House of Representatives and withheld from all the other departments of the Government; that the words "except by order of the House of Representatives" are impliedly annexed to the fourth article of the amendments to the Constitution?

I maintain, therefore, that it is competent to look into this record and see if the House had jurisdiction of the subject-matter of inquiry; whether it was such an inquiry as by law the House might institute, and whether the witness ought to be imprisoned for refusing to answer.

II.

THE POWER OF THE HOUSE TO PUNISH FOR CONTEMPT.

1. I deny the power of the House of Representatives to punish for contempt of its authority or breach of its privileges, except the power to expel its own members.

The judicial power exercised by the House in the trial, conviction, and sentence of petitioner belongs to the courts, and not to the Legislative Department of the Government.

"Every trial involves the exercise of judicial power." (*Ex parte* Milligan, 4 Wal., 121.)

"The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may, from time to time, ordain and establish." (Const., Art. III, sec. 1.)

"The Government of the United States is one of delegated powers alone. Its authority is defined and limited by the Constitution. All powers not granted to it by that instrument are reserved to the States or the people." (*United States* vs. *Cruikshank et al.*, 2 Otto, 551.)

POWERS DELEGATED TO THE HOUSE.

The powers expressly granted to the House of Representatives are—

1. To judge of the elections, returns, and qualifications of its members.

2. To compel the attendance of absent members in such manner, and under such penalties, as it may prescribe.

3. To determine the rules of its proceedings.

4. To punish its members for disorderly behavior.

5. With the concurrence of two-thirds, to expel a member.

6. The House shall have the sole power of impeachment.

PRIVILEGES OF MEMBERS OF THE HOUSE.

1. They shall in all cases, except treason, felony, and breach of the peace, be privileged from arrest during their attendance at the session of the House, and in going to and returning from the same.

2. For any speech or debate in the House they shall not be questioned in any other place.

These enumerated powers, delegated to the House of Representatives, all refer expressly to its control over its own members, except in the case of impeachment.

There is no other grant of judical power.

The authority "to determine the rules of its proceedings" relates to "proceedings" legally instituted. The House cannot extend its powers beyond their constitutional limits by any rule or rules which it may "determine."

The distinction between the *powers* granted to the House and the *privileges* conferred upon its members is clearly defined. The clause in question adds nothing to the power of the House, although it confers privileges upon its members. The House of Representatives certainly acquires no additional *judicial power* from the fact that its individual members are exempt from civil process, or from liability to respond in damages for slander uttered on the floor of the House.

Section 8, Art. I, enumerates the powers delegated to Congress, and then authorizes it, *not the House separately*, "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers vested by this Constitution in the Government of the United States, *or in any department or officer thereof*."

INCIDENTAL POWERS.

The express powers delegated to the House which I have enumerated are accompanied with an implied grant of whatever is essential to make them effectual, not to enlarge their scope or to change their nature or character. The incidental powers relate to the thing granted, so that the specific object may be accomplished.

The power of the House to punish is restricted to the punishment of its members by the express grant; the power to punish a private citizen is not incidental to the power to punish a member of the House.

In the Convention a proposition was made and referred to the select committee appointed to draft the constitution giving authority to punish for contempts, and enumerating them. The committee made no report on the subject. (Journal of Convention, Aug. 20, pp. 263, 264.)

CONSTITUTIONAL SAFEGUARDS.

When the Constitution was framed, and for many years previous, it was the custom of the House of Commons in England to punish private persons adjudged to be in contempt of its authority with severe and ignominious penalties, such as fine and imprisonment, maiming, branding on the cheek, whipping at the cart's tail, or whatever the caprice or passion of the moment dictated.

Is it to be presumed that the framers of the Constitution intended to invest like powers in the House of Representatives? and, if so, why confer the power to inflict punishment

upon its members and limit it to expulsion from the House, when it was customary for the House of Commons, before and afterwards, not only to expel, but to inflict bodily punishment upon its members adjudged in contempt?

As late as A. D. 1810, Sir Francis Burdett, a member of the House of Commons, was arrested and imprisoned for publishing a letter over his own signature in the *Weekly Register* reflecting on the House.

Was it intended that the unrestricted power of punishing private citizens at discretion for real or supposed contempt of its authority should be *silently* vested in the House when it required an express grant to authorize the punishment of its members for disorderly conduct? I think not.

On the other hand, the framers of the Constitution took abundant pains to guard the liberty of the citizen and protect him in the free enjoyment of life and property.

It cannot be presumed that they intended that, without passing a law, a man may lose his liberty for doing what he had no means of knowing was an offence; or that, without indictment, information, or affidavit, charging an offence, he could be arrested, tried, convicted, and sentenced without the intervention of a jury, or any of the safeguards which protect personal rights in civilized communities. It is a monstrous doctrine that a man may be exposed to a punishment of which he never could have heard until his sentence was pronounced. In a country where the legislature was supreme; where the law-makers could alter or abolish the constitution, or change the form of government at will; where the parliament was omnipotent, and where the exclusive power of either of its branches to punish breaches of privilege by infamous punishment was not denied, the right to exercise the power rested upon premises wholly inconsistent with the theory of our form of government.

After defining the nature and power of the English Parliament, the supreme legislature of a government in which the rights of the people are supposed to be derived from the

crown; where the divine right of kings is asserted and acknowledged, a parliament that "can alter the established religion of the land;" "that can change and create afresh even the constitution of a kingdom;" "that can, in short, do anything that is not naturally impossible," the great commentator proceeds to explain why the privileges of Parliament are not "set down and ascertained." He says:

"If, therefore, all the privileges were once to be set down and ascertained, and no privilege to be allowed but what was so defined and determined, it were easy for the executive power to devise some new case, not within the line of privilege, and under pretence thereof to harass any refractory member and violate the freedom of parliament. The dignity and independence of the two houses are therefore in great measure preserved by keeping their privileges indefinite."

Will it be claimed that the privileges of the House of Representatives rest upon a similar foundation?

Commenting upon this passage, Mr. CHRISTIAN in his note says:

"In the observations above upon the privileges of parliament, the editor is obliged to differ from the learned judge. He cannot but think that clearness and certainty are essentially necessary to the liberty of Englishmen. Mystery and ignorance are the natural parents of superstition and slavery. How can rights and privileges be claimed and asserted, unless they are ascertained and defined? The privileges of parliament, like the prerogatives of the crown, are the rights and privileges of the people. They ought all to be limited by those boundaries which afford the greatest share of security to the subject and constituent, who may be equally injured by their extension as their diminution. The privileges of the two houses ought certainly to be such as will best preserve the dignity and independence of their debates and councils without endangering the general liberty. But if they are left uncertain and indefinite, may it not be replied, with equal force, that under the pretence thereof the refractory members may harass the executive power and violate the freedom of the people?"

Mr. CHITTY's note on the same subject observes:

"It is doubtless within the scope of the constitution that parliament should have ample means within itself of enforcing its privileges; but that those privileges should be indefinite presents an anomaly in our limited government theoretically absurd, if not practically dangerous, to true liberty. *Ex post facto* laws are the resource of despotism, anxious to clothe itself with the semblance of legislative justice, and the operation of these indefinite privileges must sometimes partake of the same character. For a man may be convicted by the House for the infraction of a privilege from which there was nothing to warn him, not even the declaration of its existence; and surely this is contrary both to the spirit and the practice of the constitution."

TRIAL BY JURY.

In the case of *Milligan*, (4 Wallace, 123,) the Supreme Court, speaking of one of these safeguards—the trial by jury—says: "It is *now* assailed; but if ideas can be expressed in words, and language has any meaning, *this right*—one of the most valuable in a free country—is preserved to every one accused of crime who is not attached to the army, or navy, or militia in actual service." The sixth amendment affirms that "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury," language broad enough to embrace all persons and cases. * * * "Every one connected with these branches of the public service (the army and navy) is answerable to the jurisdiction which Congress has created for their government, and, while thus serving, surrenders his right to be tried by the civil courts. *All other persons*, citizens of States where the courts are open, if charged with crime, are guaranteed the inestimable privilege of trial by jury. This privilege is a vital principle, underlying the whole administration of criminal justice. It is not held by sufferance, and cannot be frittered away on any plea of State or political necessity. When peace prevails, and the authority of the Government is undis-

puted, there is no difficulty of preserving the safeguards of liberty; for the ordinary modes of trial are never neglected, and no one wishes it otherwise. But if society is disturbed by civil commotion—if the passions of men are aroused and the restraints of law weakened, if not disregarded—these safeguards need, and should receive, the watchful care of those entrusted with the guardianship of the Constitution and laws. In no other way can we transmit to posterity unimpaired the blessings of liberty, consecrated by the sacrifices of the Revolution."

In *Loan Association* vs. *Topeka*, (20 Wall., 655,) the Supreme Court of the United States say:

"It must be conceded that there are such rights in every free government beyond the control of the State. A government which recognized no such rights; which held the lives, the liberty, and the property of its citizens, subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is, after all, but a despotism. It is true it is a despotism of the many; of the majority, if you choose to call it so; but it is none the less a despotism. It will be doubted if a man is to hold all that he is accustomed to call his own—all in which he has placed his happiness, and the security of which is essential to that happiness—under the dominion of others, whether it is not wiser that the power should be exercised by one man than by many.

"The theory of our Government, State and National, is opposed to the deposit of unlimited power anywhere. The Executive, the Legislative, and the Judicial branches of these governments are all limited and defined powers.

"There are limitations on such powers which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name."

DUE PROCESS OF LAW.

Chancellor Kent, in his Commentaries, vol. 1, 620, (9th edition,) says:

"It may be received as a proposition universally understood and acknowledged throughout this country, that no person can be taken or imprisoned or disseized of his freehold or estate, or exiled or condemned, or deprived of life, liberty, or property, unless by the law of the land, or the judgment of his peers. The words, 'by the law of the land,' as used originally in Magna Charta in reference to this subject, are understood to mean due process of law, that is, by indictment or presentment of good and lawful men, and this, says Lord Coke, is the true sense and exposition of those words. The better and larger definition of 'due process of law' is, that it means law in the regular course of administration through courts of justice."

"To give this clause of the Constitution any value it must be understood to mean that no person shall be deprived by any form of legislation or governmental action of either life, liberty, or property, except as a consequence of judicial proceeding appropriately and legally conducted. It follows that a law, which by its own inherent force extinguishes rights of property or compels their destruction, without any legal process whatever, comes directly in conflict with the Constitution." (Potter's Dwarris on Statutes and Constitutions, 430.)

Mr. Webster, in the Dartmouth College case, said:

"By the law of the land, is most clearly intended the general law, which hears before it condemns, and proceeds upon inquiry and renders judgment only after trial; the meaning is that every citizen shall hold his life, liberty, property, and immunities under the protection of general rules which govern society. Everything which may pass under the form of legislative enactment is not, therefore, the law of the land. A construction that would do this would render constitutional provisions of the highest importance completely inoperative and void. It would tend directly to establish the union of all powers in the legislature. There would be no general permanent law for courts to administer, or for man to live under. The administration of justice would be an empty form, an idle ceremony. Judges would sit to execute legislative judgments and decrees, and not to declare the law or to administer the justice of the country.'

In *Wilkins* vs. *Leland*, (2 Peters, 657,) Judge Story said:

"The fundamental maxims of a free government seem to require the rights of personal liberty, and private property should be held sacred; at least no court of justice in this country would be warranted in assuming that the power to violate and disregard them—a power so repugnant to the common principles of justice and civil liberty—lurked under any general grant of legislative authority, or ought to be implied from any general expression of the will of the people."

In illustrating his well-remembered definition of political or civil liberty, the great English commentator said:

"Every wanton and causeless restraint of the will of the subject, whether practised by a monarch, a nobility, or a popular assembly, is a decree of tyranny." (Bl. Com., 126.)

An eminent jurist, the distinguished American editor of Blackstone's Commentaries, referring to the bills of right in the Federal and State Constitutions, (*Ib.*, 125,) says:

"Bills of rights constitute the security of the individual members of society against the acts of the majority. The great bulwork of the reserved rights protected by these restrictions is the judiciary department. They have the unquestioned power of declaring *any act of the Government in any of its departments* which infringes any of these rights t be utterly null and void. That department spreads the broad and impregnable shield of its protection over the life, limbs, liberty, reputation, and property of the citizen, when invaded even by the will of the majority."

"No person shall be deprived of liberty or property without due process of law," is the text of the Constitution.

If the petitioner is lawfully imprisoned, then a commitment as punishment for contempt by the House of Representatives is "due process of law."

There is no provision of the Constitution that expressly or incidentally empowers the House to *punish* persons other han its own members. There is no act of Congress that

authorizes it. This power, therefore, must be looked for outside of the Constitution and acts of Congress, which are declared to be the "supreme law of the land."

The House alone has no authority to make a law. It may establish rules for its government, but it has made no rule prescribing imprisonment for contempt.

The House having no power to make a law, and there being no law of Congress prescribing this penalty for contempt of that body, from what source is the power derived under which the House creates the offence and determines the penalty at will?

Where the offence is not defined, and no penalty is fixed beforehand, the House assumes legislative power in each case, because it assumes to create an offence which did not before exist, and prescribes the penalty for its violation.

Such a law would be *ex post facto*, for it has no existence until after the offence is committed.

It is void, for the reason that neither House can make a law in its individual capacity.

The law not being in existence when the act complained of was committed, the act therefore is not in violation of law—for there was, at the time it was committed, no law to violate.

There being no law defining this offence, it necessarily follows that the House assumes to make the law in each case as it arises, or there would be no law; and, therefore, a citizen imprisoned for contempt would confessedly be "deprived of his liberty without due process of law."

If the House can legislate on this subject exclusive of the Senate, and divest the Executive of his veto power, what is the limit to its powers? May it not repeal existing laws?

Congress having enacted no law declaring what is or is not a contempt of the authority of the House, or a breach of its privileges, how can a law that never existed be violated?

How does the petitioner or any citizen know what is or is not a contempt of that body?

The laws of Caligula were placed so high they could not be read, yet they were declared and promulgated before they were enforced. Here the law of contempt is locked up in the breasts of members of Congress, to be divulged and applied after the act has been committed. I do not know but what I have written down in this brief, denying to it this power, may be regarded by the House as a contempt of its authority. The plaintiff denied its right to inquire into his private business or to inspect his private papers, and was imprisoned in the common jail by order of the House. If I refuse to take off my hat to a member of the House on the public street in this city is it a contempt for which I may be imprisoned? I do not know. Your Honors do not know. But this Court in a very recent case said that "Every man should be able to know with certainty when he is committing a crime." (*United States* vs. *Reese et al.*, 2 Otto, 220.)

In *Calder* vs. *Bull*, (3 Dal., 386,) the Supreme Court said: "A law that punished a citizen for an innocent action, or, in other words, for an act which when it was done was in violation of no existing law; a law that destroys or impairs the obligation of contracts of citizens; a law that makes a man a judge in his own cause; or a law that takes property from A and gives it to B. It is against all reason and justice for a people to trust a legislature with such powers, and therefore it cannot be presumed that they have done it."

Again: "The prohibition against their (the States) making any *ex post facto* laws was introduced for greater caution, and very probably arose from the knowledge that the Parliament of Great Britain claimed and exercised a power to pass such laws under the denomination of bills of attainder, or bills of pains and penalties; the first inflicting capital and the other less punishment. These acts were legislative judgments and an exercise of judicial power. Sometimes they respected the crime, by declaring acts to be treason which were not treason when committed; at other times they violated the rules of evidence to supply a deficiency of legal proof, by admitting one witness when the existing law required two; by receiving evidence without oath, or the oath

of the wife against the husband, or other testimony which the courts of justice would not admit; at other times they inflicted punishments where the party was not by law liable to any punishment; and in other cases they inflicted greater punishment than the law annexed to the offence. The ground for the exercise of such legislative power was this: that the safety of the kingdom depended on the death or other punishment of the offender; as if traitors, when discovered, could be so formidable, or the government so insecure. With very few exceptions, the advocates of such laws were stimulated by ambition or personal resentment and vindictive malice. To prevent such and similar acts of violence and injustice, I believe the Federal and State legislatures were prohibited from passing any bill of attainder, or any *ex post facto* law." * * *

"I will state," continues the opinion, "what laws I consider *ex post facto* laws within the words and intent of the prohibition:

"1. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action.

"2. Every law that aggravates a crime, or makes it greater than it was when committed.

"3. Every law that changes the punishment and inflicts a greater punishment than the law annexed to the crime when committed.

"4. Every law that alters the legal rules of evidence, and receives less or different testimony than the law required at the time of the commission of the offence in order to convict the offender. All these and similar laws are manifestly unjust and improper."

Iredell, J., in the same case, said:

"The history of every country in Europe will furnish flagrant instances of tyranny exercised under the pretext of penal dispensations. Rival factions, in their efforts to crush each other, have superseded all the forms and suppressed all the sentiments of justice; while attainders, on the principle of retaliation and proscription, have marked all the vicissitudes of party triumph. The temptation to such abuses of

power is unfortunately too alluring for human virtue; and, therefore, the framers of the American Constitution have wisely denied to the respective legislatures, Federal as well as State, the possession of the power itself. They shall not pass any *ex post facto* law; or, in other words, they shall not inflict a punishment for any act which was innocent at the time it was committed, nor increase the degree of punishment previously denounced for any specific offence."

By the express words of the Constitution, a citizen is protected from unreasonable searches and seizures. His books and papers are secured in his own keeping. There shall be no warrants for his arrest, except upon oath or affirmation. He shall have a speedy and public trial, and be confronted with the witnesses against him. He shall be informed of the nature and cause of the accusation, and have compulsory process for obtaining witnesses in his favor, and the assistance of counsel for his defence. Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment shall be inflicted. He shall not be subject for the same offence to be twice put in jeopardy of life or limb, nor be compelled to be a witness against himself. His property shall not be taken for public use without just compensation, and in suits at common law, where the value in controversy exceeds twenty dollars, the right of trial by jury is preserved.

These provisions are general in their operation, and apply to all branches or departments of the Government, and all acts by any officer, executive, legislative, or judicial, or of any public body, or any act of Congress infringing them, or any one of them, is unlawful and void.

The advocates of this power rest on three several grounds:

1. That the power is delegated by the Constitution; or,

2. That it is derived from the English Parliament and precedents; or,

3. That its exercise is an inherent right that pertains to the House as a legislative body, and is necessary for "self-preservation."

I have already discussed the first proposition, and will only refer to a single point.

IMPEACHMENT.

The sole power of impeachment is vested in the House by the Constitution.

As the grand inquest of the nation, it invokes its inquisitorial powers through its committees of investigation.

The power to administer oaths to witnesses is conferred on the chairman of a committee of the House by statute. (Sec. 101, Rev. Stat., p. 17.)

The power to impeach does not include the power to try; that rests with the Senate. The right of the House to punish a member is conferred by a different clause of the Constitution, and is restricted to its members. In all other cases its powers and functions resemble a grand jury; having made its presentment to the court, the Senate, its inquisitorial powers are exhausted. The High Court of Impeachment takes jurisdiction of the case, and determines it, the House acting as the prosecutor.

This inquisitorial power is exercised in secret; it is *ex parte*. The object sought is the detection of crime or official malversation. If no wrong is discovered, nothing has been accomplished.

How, then, shall we construe a grant of power for such a purpose? Criminal statutes are construed strictly; and constitutional provisions, involving the rights of a citizen, will be construed in favor of liberty, unless the contrary clearly appears.

If the power to investigate by a committee of the House is incident to its constitutional power of impeachment, and the express grant provides no rule or method governing the inquisition, and Congress has "made a necessary and proper law" prescribing the course to be pursued, then it is evident that any other course of procedure than that prescribed by

the statute would be not only in derogation of the statute, but in violation of the Constitution, which provides that Congress shall have power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or office thereof."

Section 102, Revised Statutes, provides:

"Every person who, having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House or any committee of either House of Congress, wilfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than one thousand dollars nor less than one hundred dollars, and imprisonment in a common jail for not less than one month nor more than twelve months."

By section 104 (p. 17) it is provided that when such witness refuses to testify before such committee, the Speaker shall certify the matter to the District attorney, who is required to bring the matter before the grand jury for their action.

If, then, the Real-Estate Pool investigation is instituted under the provision of the Constitution which confers on the House the power of impeachment, I maintain that Congress, having prescribed the duties of the committee and the House in cases of recusant witnesses, the House must discharge those duties in strict accordance with the provisions of the statute.

AS TO THE LEX PARLIAMENTI.

The *lex parliamenti* of England, in force at the adoption of our Federal Constitution, was a separate and distinct branch of English law. It concerned the government of the two Houses of Parliament, and was entirely distinct from the jurisdiction of Westminster Hall.

Lord Coke, in 4 Inst., says:

"And this is the reason that judges ought not to give any opinion of a matter of parliament, because it is not to be decided by the common law, but *secundum legem et consuetudinem parliamenti.*"

"The high court of parliament hath also its own peculiar law, called the *lex consuetudo parliamenti.*" (1 Bl. Com., 163.)

"The whole of the law and custom of parliament has its original from this one maxim: that whatever matter arises concerning either house of parliament ought to be examined, discussed, and adjudged in that place to which it relates, and not elsewhere." (Bl. Com., 163.)

In *King* vs. *Flower*, (8 Term Rep., 314,) Gould, J., said:

"This court cannot know the nature and form of the proceedings of the House of Commons; it is formed on a different law; the *lex consuetudo parliamenti* is known to parliament men only."

"It was determined in *King* vs. *Flower*, *Burdett* vs. *Abbott*, and *Bondell* vs. *Colman*, that the privileges of parliament, whether in punishing a person not one of their members or in punishing one of their own body, are not amenable in a court of common law; that their adjudication of any offence is a sufficient judgment, the warrant of the Speaker a sufficient commitment, and that outer doors may be broken open to have execution of their process." (Bl. Com., 163, Mr. Christian's note.)

Again, Mr. Justice Blackstone, speaking of the Houses of Parliament, says:

"But the maxims upon which they proceed, together with the method of proceeding, rest entirely in the breast of the Parliament itself, and are not defined and ascertained by any stated laws." (1 Bl. Com., 164.)

In 31 Hen. VI, the House of Lords propounded a question to the judges concerning their privileges, and the Chief-Justice, Sir John Fortescue, in the name of his brethren, declared

"That they ought not to make answer to that question, for it hath not been used aforetime that the justices should in any wise determine the privileges of the high court of Parliament. For it is so high and mighty in its nature that it may make law, and that which is law it may make no law; and the determination and knowledge of that privilege belongs to the Lords of Parliament, and not to justices." (Seld. Baronage, part 1, c. 4.)

In the case of Brass Colby, (3 Wilson, 188,) Chief-Justice De Grey said: "This court cannot take cognizance of a commitment by the House of Commons, because it cannot judge by the same law; for the law by which the Commons judge of their privileges is unknown to us."

Under this law the respective Houses of Parliament, acting in their judicial capacity, took cognizance of questions of privilege and contempt.

The unbroken chain of authorities in support of the power of the House of Commons to punish for contempt rests the doctrine upon the judicial power of that House. The House is a court, and as such it tries, convicts, and sentences.

Having exclusive jurisdiction, no other court has power to review its action. The House of Commons merely avails itself, when sitting judicially, of the maxim that all courts are final judges of contempts against themselves. (Lord Mayor's case, 3 Wilson, 188; 7 St. Trials, 437; 2 Hawkins, chap. 4, sec. 72.)

Lord Coke says: "And it is known that the Lords, in their House, have power of judicature, and the Commons, in their House, have power of judicature, and both Houses together have power of judicature."

"The House of Commons is, to many purposes, a distinct court." (4th Inst.)

In the debate in the House of Commons, 1774, on a question of contempt, Solicitor-General Wedderburne said: "I am amazed that the House should, upon this occasion, be considered in the light of a prosecutor. The House is now sitting its judicial capacity."

The Attorney-General (Lord Thurlow) said: "We, sir, are a court of inquiry as well as a court of criminal jurisdiction."

In *Regina* vs. *Patey*, (2 Ld. Ray, 1108,) Powis, J., said: "The House of Commons is a great court, and all things done by them are to be intended to have been *rite acta*."

I maintain that the authorities I have referred to establish—

1. That at the adoption of the Federal Constitution, the *lex parliamenti* was recognized in England as a distinct branch of British law.

2. That this law was exclusively administered by the Houses of Lords or Commons individually, or by the Parliament, as legally-recognized courts, and that questions of privilege and contempt were not within the jurisdiction of any other tribunal.

It was upon this principle that the power of the House of Commons to punish for contempt was regarded as not prohibited by *Magna Charta*, or the statute of 28 Ed. III, which provides that no man shall be imprisoned without being brought to trial by due process of law.

In the case of *Burdett* vs. *Abbott* (14 East. R., 292) Lord Ellenborough said:

"It has been argued that they (the Commons) are prohibited from imprisoning persons by the statute of *Magna Charta* and the 28 Ed. III, c. 3; but the provision in *Magna Charta* directed against acts of unauthorized force, 'that no man shall be imprisoned but by the *lawful* judgment of his peers or by the law of the land;' and that of the statute, (28 Ed. III,) 'that no man shall be put out of land or tenement, nor taken or imprisoned, nor disinherited nor put to death without being brought in to answer *by due process of law*,' are satisfied, as far as they relate to this subject, if the *lex et consuetudo parliamenti* be, as Lord Coke and all the writers on the law have held that it is, part of the law of the land in its large and extended sense."

Applying the English doctrine here—in other words, to as-

sert that the House of Representatives may exercise the power wielded by the House of Commons—is to maintain that the *lex parliamenti* is in force and effect here, and that the House itself is a court—that this law is above the Constitution; for it will not be claimed that the judgments of the House of Commons, under the sanction of this "higher law," the *lex parliamenti*, could be enforced in this country until the Constitution is abolished, until the theory of this Government is reversed and the Congress becomes what Parliament is, or until the work of the Revolution is undone, and we return to our allegiance to the Crown and Parliament of Great Britain.

If this English law is in force here, it must have been adopted at some time or other in our history, and there should be some record of its adoption.

It is said that the Constitution, and the laws made pursuant thereto, and treaties made under the authority of the United States, shall be the supreme law of the land. This would exclude the *lex parliamenti*, unless it has been adopted by Congress or by treaty stipulation. That, I presume, will not be claimed; nor can it be shown that any portion has been adopted. If any one part of this law is in force in this country, then the whole of it has been adopted, for there is no act of Congress that discriminates between what is adopted and what is omitted. The repeated usurpation by either House of Congress of the whole or any portion of the powers of Parliament conferred by that law would be only usurpation at last. Neither House of Congress can make a new law or adopt an old law of England or Spain or any other country.

If, therefore, any portion of the *lex parliamenti* is in force, the entire code, whatever it is, is in full operation, including its remedial provisions. Lord Campbell, attorney-general, in the case of *Stockdale* vs. *Hansard*, points out how a subject may obtain redress when his rights have been invaded by the House of Commons in cases of privilege: "1st. He may be

heard, and his grievances redressed by petition to the House. 2d. There may be a conference between the two Houses. 3d. If the House persist in excess of authority it may be dissolved."

This being a part of the *lex parliamenti*, it follows that such is the remedy here. Should the President, therefore, be of opinion that the House acted in excess of its authority, it would be his duty to dissolve it. This is necessarily true if this English law is in force in this country. I concede that such action by the President would be in violation of the Constitution and of his oath to support it; but this question involves a "higher law" outside of and above that instrument, for the very question on which this point turns is, whether or not there has been transported from England a law authorizing the House of Representatives to do that which the Constitution prohibits?

This monstrous doctrine, void of law or logic, based on absurdity, is advanced in order to prove that a citizen may be deprived of his liberty in some other way than the Constitution or the statute authorizes. The Constitution antedates the Congress; the House of Representatives is the product of the Constitution. Born of the Constitution, it had no prescriptive rights to be recognized by that instrument, for it had no existence until the Constitution created it. How, then, did this English law become the law of this country? In what clause of the Constitution or in what statute is it declared that the *lex parliamenti*, or any part of it, shall govern either branch of the American Congress?

If that law has been adopted by this Government, then its construction by the English courts is the rule of its interpretation here. In *Pennock* vs. *Dialogue*, (2 Peters, 2,) the Supreme Court says: "Where English statutes are adopted into our own legislation, the known and settled construction of them by courts of law is considered as silently incorporated into the acts, or is received with all the weight of authority." (See also *Kirkpatrick* vs. *Gibson*, 2 Brockenbor ough, 388.)

The settled construction of the *lex parliamenti* by the English courts, the House of Lords, and the Commons, they having its exclusive administration, is best illustrated by a reference to a few of the cases:

1. *Floyde's* case.—Floyde, for a slight offence, if it were one, against King James I, in speaking of his daughter and son-in-law, was adjudged by the House of Commons to be in contempt. His fortune was confiscated, his body tortured, his name degraded, and himself imprisoned for life. (2 How. State Tr., 1143.)

2. "Feb. 27, 1620.—Richard Reynolds and Robert Wright, for arresting a servant of the Earl of Oxford, were ordered to be set on horseback near Westminster Hall, neither of them to have cloak or hat, but to have on their breasts and backs papers expressing their faults, viz: 'For a contemptuous breach of the privileges of Parliament, aggravated by contemptuous speeches,' and so as to pass to the Fleet, where they are to be left prisoners."

3. In *Murray's* case, (1 Wilson, 299,) the Commons confined him a close prisoner for contempt. He was denied pen and paper or any communication with his friends. His health was suffering, and a physician was not allowed to visit him, except upon the order of the House.

4. "June 13, 1626.—George Gardner, for scandalizing the Justice of the House, and for unjustly slandering the Lord Keeper, was ordered to stand in the pillory at Westminster, with a paper on his head declaring his offence, and to ride backward with the same paper to the cross in Cheapside, and so to stand in the pillory there, and so to ride back to the Fleet."

5. In the case of *Jay* vs. *Topham*, (12 How. St. Tr.,) "The House of Commons ordered the defendant, their Serjeant-at-arms, to arrest and imprison the plaintiff, for having dared to exercise the common right of all *Englishmen*, of presenting a petition to the king on the state of public affairs when no parliament existed. For this imprisonment an action was

brought. The declaration complained not only of the personal trespass, but also of extortion of the plaintiff's money, practised by defendant under color of the Speaker's warrant. The plea of justification under that warrant, which could not possibly authorize the extortion, even if it could the arrest, was overruled by the court, no doubt with the utmost propriety, for the law, says Lord Denman, was clear. Lord Ellenborough points this out in the most forcible manner in 14 East, 109."

Yet, for this righteous judgment, Chief-Justice Pemberton and one of his brethren were summoned before the Convention Parliament, when they vindicated their conduct by unanswerable reasoning, but were, notwithstanding, committed to the prison of Newgate for the remainder of the session.

6. It was adjudged a contempt of the House of Lords to kill Lord Galway's rabbits; also to fish in Admiral Griffin's pool. (See Lord Denman's opinion in *Stockdale* vs. *Hansard*, 9 Adolphus and Ellis, 109.)

7. In Bell's case, (59 Lord's Journal, 199,206,) where the messenger of the House of Lords had received an umbrella from the owner at the door of the House and had not returned it, and the owner sued for the value and recovered, the House summoned both the owner and the court officers before them. The plaintiff was discharged on his submission, and the officers upon their declaring their ignorance of the nature of the summons.

8. "June 12, 1628.—Ensign Reyndes, for ignominious speeches and contempt of this High Court of Parliament, was adjudged never to bear arms, to be unworthy of a soldier, to imprisonment during pleasure, to stand in the pillory and to ask forgiveness, and fined."

9. "March 1, 1676.—Dr. Cary was fined one thousand pounds for refusing to discover his knowledge of a libel, and to be committed to the Tower."

10. "1746.—Samuel Johnson, author of a printed paper containing impudent reflections on the proceedings of the House. To the Sergeant."

11. Sir Francis Burdett, a member of the House of Commons, having published a letter over his own signature, his house was broken into by the Sergeant-at-arms, and he was committed to the Tower. (14 East., 293.)

12. "1771.—Henry Baldwin and Thomas Wright, printing the debates and misrepresenting the speeches of members. To the Sergeant."

13. "1774.—H. S. Woodfall, for publishing a letter highly reflecting on the character of the Speaker. To the Sergeant."

14. Not only did the House of Commons, in Charles the Second's time, placard Westminster Hall with injunctions to barristers against daring to appear in the discharge of their duty to their clients, but they sent their Sergeant-at-arms to imprison counsel, solicitors, and parties who had violated their privileges by presuming to appear at the bar of the highest court of appeal in the country. (Cited in *Stockdale* vs. *Hansard*.)

I have cited these cases to show the nature and character of the *lex parliamenti*, and how it was construed and administered, and how it may be enforced here, if it has, (as it would seem to be claimed,) by some mysterious process, become a part of the law of this country.

In concluding this branch of the subject I beg to submit that the power of the House of Representatives is not the power of the House of Commons, and that their cases are not precedents; that the *lex parliamenti* has no more force in either House of Congress than the common law of England, as such, has force in the courts of the United States.

THE INHERENT RIGHT OF SELF-PRESERVATION.

I have thus far attempted to show that this power is not delegated by the Constitution, nor conferred by the parliamentary law of England. It remains to be ascertained

whether it exists in the House, *ex necessitate*, or as an inherent power of self-preservation.

If it be true that all legislative bodies possess this power as an inherent right, there is of course no power to divest it, either by constitutional provision or legislative enactment. If it pertains *ex necessitate*, to be divested of it would destroy the body itself, for neither house of Congress could exist if that which is essential to its preservation were taken from it. The proposition, therefore, seems to resolve itself into this, that to divest either or both houses of Congress of this power would be to destroy them.

It is said in the English cases that this power was originally granted to the houses of Parliament by statute. If that be true, it could not have been an inherent right of the House of Lords or the Commons. If it were conferred by stafute, the repeal of the statute would take it away; and if the Parliament existed before this statute was passed, it could continue to exist afterward, and it would be idle to say that an inherent right was conferred by statute.

In *Burdett* vs. *Abbott*, (14 East.,) Lord Ellenborough, after referring to the fact that the two houses of Parliament formerly sat together, said:

"The privileges which have been since enjoyed, and the functions which have been since uniformly exercised by each branch of the legislature, with the knowledge and acquiesence of the other house and of the king, must be presumed to be the privileges and functions which then—that is, at the very period of their original separation—were *statutably* assigned to each."

Again, referring to what was said by Selden, he adds:

"But Selden, I observe, (Prin. of Parl., 713,) acknowledges that there had been a great change in the constitution of Parliament, but supposes it to have happened long before the 49 H. III, namely, in the time of that king's father, King John, (still placing it, however, within the time of legal memory,)

and he supposes that it was *done by a law*, though the law be lost, as *many rolls of Parliament were wherein those laws were entered*."

"Without resting any longer, however, upon these precedents, I come with more satisfaction to an authority which cannot be gainsayed or questioned—to the legislative recognition of a power in either house of Parliament to punish by imprisonment, for that, I think, is virtually to be understood from the stat. 1, Jac. I, c. 13."

He then refers to the stat. of 4 Hen. VIII, and examines 1 Jac., c. 13, and adds:

"I have mentioned this instance, not from the necessity of the thing in so plain a case, but because it has been thrown out very confidently that the privilege of the House of Commons stood upon no parliamentary recognition or authority whatsoever. Here, however, is a direct parliamentary recognition of their right to inflict punishment by censure in Parliament in the one case that is specifically mentioned, and it virtually ratifies what had been antecedently done by the House in the way of punishment, of which the usual mode appears to have been by imprisonment."

JUNIUS, in a note to his 44th Letter, observes: "The necessity of securing the House of Commons against the king's power, so that no interruption might be given either to the attendance of the members in Parliament or to the freedom of debate, was the foundation of parliamentary privilege; and we may observe in all the addresses of new appointed speakers to the sovereign the utmost privilege they demand is liberty of speech and freedom from arrests. The very word privilege means no more than immunity or a safeguard to the party who possesses it, and can never be construed into an active power of invading the rights of others."

It is not a truism that because it is necessary that a man should have a thing that, *therefore*, he has it.

If the House of Representatives may exercise all the power they deem "necessary" to accomplish a determined purpose,

where is the limit of its power? The answer is plain: That limit is the boundary of its discretion. If, then, the makers of the Constitution intended that the House should exercise whatever power it considered necessary, it surely follows that, like the Parliament of England, it is omnipotent, restricted only by the limits of its own discretion, and the sole judge of the necessity in each particular case.

Again, to assert that the power to punish for contempts pertains to the House *ex necessitate*, is only saying in a different way that a House of Representatives deprived of this power would not meet the requirements of such a legislative body as the framers of the Constitution intended to create. In other words, it is an assertion that unless the House alone can make a law punishing an act already committed, and then, as the party injured, as accuser and judge proceed to try, convict, and sentence, without indictment, information, or affidavit, without a jury, without an opportunity for the accused to controvert the witnesses against him, it is not a legislative body.

"In all tyrannical governments the supreme magistracy, or the right of both *making* and *enforcing* the laws, is vested in one and the same man, or one and the same body of men; and wherever these two powers are united together there can be no public liberty." (1 Bl., 145.)

Subsequent to the reign of Elizabeth, the principles of the House of Commons were extended as a check to the prerogative of the crown; new powers were asserted, and exercised without question, resting upon no foundation but the will of the House, until it was discovered that the remedy was worse than the evil it was intended to cure. Referring to the privileges claimed by the House of Commons in 1771, the 44th letter of Junius contains the following:

"If, however, it could be proved, from considerations of necessity or convenience, that an unlimited power of commitment ought to be entrusted to the House of Commons, and

that, *in fact*, they have exercised it without opposition, still, in contemplation of law, the presumption is strongly against them. It is a leading maxim of the laws of England (and without it all laws are nugatory) that there is no right without a remedy, nor any legal power without a legal course to carry it into effect. Let the power now in question be tried by this rule. The speaker issues his warrant of attachment. The party attached either resists force with force, or appeals to a magistrate, who declares the warrant illegal and discharges the prisoner. Does the law provide no legal means for enforcing a legal warrant? Is there no regular proceeding pointed out in our law-books to assert and vindicate the authority of so high a court as the House of Commons? The question is answered directly by the fact. Their unlawful commands are resisted, and they have no remedy. The imprisonment of their own members is revenge indeed, but it is no assertion of the privilege they contend for. Their whole proceeding stops, there they stand, ashamed to retreat and unable to advance. * * *

"It may now be objected to me that my arguments prove too much; for that certainly there may be instances of contempt and insult to the House of Commons which do not fall within my own exceptions, yet, in regard to the dignity of the House, ought not to pass unpunished. Be it so. The courts of criminal jurisdiction are open to prosecutions which the Attorney-General may commence by information or indictment. * * * In my opinion they (the Commons) would consult their real dignity much better by appealing to the laws when they are offended than by violating the first principle of natural justice, which forbids us to be judges when we are parties to the cause."

In the same letter the writer observes:

"To establish a claim of privilege in either House, and to distinguish original right from usurpation, it must appear that it is indispensably necessary for the performance of the duty they are employed in, and also that it has been uniformly allowed. From the first part of this description, it follows clearly that whatever privilege does of right belong to the present House of Commons did equally belong to the first assembly of their predecessors, was as completely vested in them, and might have been exercised in the same extent.

From the second we must infer that privileges which, for several centuries, were not only never allowed, but never even claimed by the House of Commons, must be founded upon usurpation. The constitutional duties of a House of Commons are not very complicated nor mysterious. They are to propose or assent to wholesome laws for the benefit of the nation. They are to grant the necessary aids to the king, petition for the redress of grievances, and prosecute treason or high crimes against the State. If unlimited privilege be necessary to the performance of these duties, we have reason to conclude that, for many centuries after the institution of the House of Commons, they were never performed. I am not bound to prove a negative, but I appeal to the English history when I affirm that, with the exceptions already stated, (which yet I might safely relinquish,) there is no precedent from the year 1265 to the death of Queen Elizabeth, of the House of Commons having imprisoned any man (not a member of their House) for contempt or beach of privilege. In the most flagrant cases, and when their acknowledged privileges were most grossly violated, the *poor Commons*, as they then styled themselves, never took the power of punishment into their own hands. They either sought redress by petition to the king, or, what is more remarkable, applied for justice to the House of Lords; and when satisfaction was denied them or delayed, their only remedy was to refuse proceeding upon the king's business. So little conception had our ancestors of the monstrous doctrines now maintained concerning privilege, that, in the reign of Elizabeth, even liberty of speech, the vital principle of a deliberative assembly, was restrained by the queen's authority to a simple *aye* or *no;* and this restriction, though imposed upon three successive parliaments, was never once disputed by the House of Commons.

"I know there are many precedents of arbitrary commitments for contempt. But, besides that, they are of too modern a date to warrant a presumption that such a power was originally vested in the House of Commons. *Fact* alone does not constitute *Right*. If it does, general warrants were lawful."

This doctrine of the "inherent right of self-preservation" and *ex necessitate* was not overlooked by the framers of the Constitution. I have already adverted to the fact that they

were familiar with the abuses and despotic invasion of private rights by the House of Commons, contemporaneous with and prior to the adoption of the Constitution. They had not forgotten the infamous punishments, the imprisonments, the mutilations and maimings of loyal and honest Englishmen by the House of Commons for assumed contempts and breaches of its privileges. They remembered that that House had declared "That whatever is enacted or declared for law by the Commons in parliament assembled hath the force of law; and all the people of this nation are concluded thereby, although the consent and concurrence of the King or House of Peers be not had thereto." (Bl. Com., 160.) And they were constructing a government of delegated powers, by which the powers not delegated to the United States by its Constitution, nor prohibited by it to the States, were reserved to the States respectively, or to the people.

Instead of recognizing the right of a legislative body to punish a citizen, they provided such abundant safeguards "That he who walks in honesty, walks without fear."

So jealous of the rights and liberties of the citizen were they that the right of inflicting punishment by the House was restricted to the punishment of its own members for disorderly conduct, and that not to extend beyond expulsion, and only then by a vote of two-thirds of the whole House.

Is there "a divinity that doth hedge in" a member of the House, which protects him from punishment for contempt, beyond expulsion, and that he cannot be thus punished, except two-thirds of all the members of the House concur, while a citizen may be imprisoned by a majority vote?

The natural or inherent right to inflict punishment does not exist in this country. How strangely it sounds in American ears! *Who* has the natural, the inherent right, to punish an American citizen? What masters have we here that presume to claim an inherent right to incarcerate in a dungeon the humblest in the land bearing the title of "an American citizen?"

The power *to punish* does not belong inherently to any legislative body or tribunal. The right of self-defence and self-preservation is a natural right, and is inherent in all public bodies, as well as individuals.

The *power to punish* is a delegated power. It is surrendered to the Government by the whole people, each individual consenting to be deprived of a part of his natural rights whenever he has committed a wrongful act against the people, his fellow-members to this compact. "Political, therefore, or civil liberty, which is that of a member of society, is no other than natural liberty so far restrained by human laws (and no farther) as is necessary and expedient for the general advantage of the public." (Bl. Com., 125.)

I claim, therefore, that the power to punish must be derived from the whole body of the people, in which alone it originally resides, and from which it can only be acquired by organic, positive law.

I do not deny the right of self-defence or self-preservation. I insist that the House may preserve order and decorum; arrest, remove, or restrain intruders or disturbers of its deliberations. It may protect its rights as I protect my own. It may resist force by force in self-defence, but when the disturbance is ended and order is restored that is the end of the matter, *unless some law has been violated;* in that event the courts will intervene and justice will be done.

An eminent American law writer observes:

"No legal foundation for the action of the House of Representatives exists in the common law, which before the Revolution of 1776 was the rule of decision in the British colonies on the American side of the Atlantic, and since that Revolution has *in the sovereign States* then formed continued a rule of decision, except in those respects wherein it is altered by the Constitution or the laws. According to that common law there is a well-established distinction between a power to punish for a contempt, which is a judicial power, and a power to remove an obstruction offered to the delibera-

tions or proper action of a legislative body during its sitting, which last power is necessary for self-preservation. It may have been sometimes thought that the power of punishing contempts is inherent in every assembly that possesses a supreme legislative authority, whether they are such as are a direct obstruction to its due course of proceeding or such as leave a tendency indirectly to produce such obstruction. But it is now settled in England that the common law is otherwise." (*Robinson's Practice*, vol. 6, page VI.)

The distinction between the judicial power to punish for contempt and the power to remove an obstruction to the discharge of legislative business is illustrated in *Doyle* vs. *Falconer*, (4 Moore's P. C. C., N. S., 217, 218,) in which it is observed:

"If a member of a colonial house of assembly be guilty of disorderly conduct in the house while sitting he may be removed or excluded for a time, or even expelled; but there is a great difference between such powers and the judicial power of inflicting a penal sentence for the offence. The right to remove for self-security is one thing, the right to inflict punishment is another. The former is, in their lordship's judgment, all that is warranted by the legal maxim that has been cited;* but the latter is not its legitimate consequence."

"If the good sense and conduct of members of the colonial legislature prove, as in the present case, insufficient to secure order and decency of debate the law would sanction the use of that degree of force which might be necessary to remove the person offending from the place of meeting, and keep him excluded. The same rule would apply *a fortiori* to obstructions caused by any person not a member. And whenever the violation of order amounts to a breach of the peace, *or other legal* offence, recourse may be had to the ordinary tribunals." (S. C., 219.)

Upon looking into the constitutions of the several States it will be seen that in a majority of them the power of the

* "*Quando lex aliquid concedit, concedere videtur et illud sine quo res ipsa esse non potest.*"

houses of State legislatures to punish for contempt is expressly delegated. On the theory that these bodies possessed that right inherently, or as a means of self-preservation, these constitutional grants by the people of the different States are only a waste of words, meaning nothing.

I beg to call attention to the following extracts from several of the State constitutions:

MAINE.—"Each house during its session may punish by imprisonment any person, not a member, for disrespectful or disorderly behavior in its presence," &c.

MASSACHUSETTS.—"The house of representatives shall have authority to punish by imprisonment every person not a member who shall be guilty of disrespect to the house, or by any disorderly or contemptuous behavior in its presence," &c.

NEW HAMPSHIRE.—"They (the house of representatives) shall have authority to punish by imprisonment every person who shall be guilty of disrespect to the house in its presence, by any disorderly and contemptuous behavior," &c.

RHODE ISLAND.—"Each house may determine its rules of proceeding, punish contempt, punish its members for disorderly behavior," &c.

MARYLAND.—"The house of delegates may inquire, on the oath of witnesses, into all complaints, grievances, and offences, as the grand inquest of the State, and may commit any person for any crime to the public jail, there to remain until discharged by due course of law."

SOUTH CAROLINA.—"Each house may punish by imprisonment, during sitting, any person, not a member, who shall be guilty of disrespect to the house by any disorderly or contemptuous behavior in its presence," &c.

GEORGIA.—"Each house may punish by imprisonment, during session, any person not a member who shall be guilty of disrespect by any disorderly or contemptuous behavior," &c.

TENNESSEE.—"Each house may punish by imprisonment, during session, any person not a member who shall be

guilty of disrespect to the house by any disorderly or contemptuous behavior in its presence."

INDIANA.—"Either house, during its session, may punish by imprisonment any person not a member who shall have been guilty of disrespect," &c.

LOUISIANA.—"Each house may punish by imprisonment any person not a member for disrespectful and disorderly behavior in its presence," &c.

MISSISSIPPI.—"Each house may punish by imprisonment, during the session, any person not a member for disrespectful or disorderly behavior in its presence," &c.

ILLINOIS.—"Each house may punish by imprisonment, during its session, any person not a member who shall be guilty of disrespect to the house by any disorderly or contemptuous behavior," &c.

ALABAMA.—"Each house during the session may punish by imprisonment any person not a member for disrespectful or disorderly behavior in its presence," &c.

MISSOURI.—"Each house may punish by fine and imprisonment any person not a member who shall be guilty of disrespect to the house," &c.

FLORIDA.—"Each house during the session may punish by imprisonment any person not a member for disrespectful or disorderly behavior in its presence, or for obstructing any of its proceedings," &c.

ARKANSAS.—"Each house may punish by fine and imprisonment any person not a member who shall be guilty of disrespect to the house," &c.

TEXAS.—"Each house may punish by imprisonment during the session any person not a member for disrespectful or disorderly conduct in its presence," &c.

MINNESOTA —"Each house may punish by imprisonment during its session any person not a member who shall be guilty of any disorderly or contemptuous behavior in their presence," &c.

OREGON.—"Either house during its session may punish by

imprisonment any person not a member who shall have been guilty of disrespect to the house by disorderly or contemptuous behavior in its presence," &c.

WEST VIRGINIA.—"Each branch shall have the power necessary to provide for its own safety and the undisturbed transaction of its business, and may punish by imprisonment any person not a member for disrespectful behavior in its presence," &c.

In several of the State constitutions which do not contain this provision there is a clause providing, "And each house shall have all other powers necessary for a branch of a legislature of a free State," or similar expression.

I only allude to this in order to call attention to the fact that no similar provision is contained in the Federal Constitution in regard to the House of Representatives.

If the power to punish for contempt is incident to the power to legislate, then any interference with the executive in the performance of his legislative duty in the exercise of his veto power, or the approval of a law, would be a breach of privilege or contempt, which he would be authorized to punish as such. It will not be disputed that in the performance of these duties the President acts in a legislative capacity; yet it will scarcely be claimed that if the President were to be assaulted for approving or vetoing an act of Congress that he could adjudge the offender in contempt and send him to jail.

And yet it will not be denied that there is, at least, the same necessity that the Executive, in the performance of his official duties, should not be molested, as that the deliberations of the respective houses of Congress should be protected.

PRECEDENTS OF THE HOUSE.

The authority of precedent is invoked to sustain the right of the House to exercise this power. In answer to that I respectfully submit that the right of the House of Representatives to *punish* for contempts has never been legally asserted

by the House. The *power has been exercised*, but in no instance has the House declared the principle upon which the right to exercise the power rests.

An examination of the debates will disclose the fact that the House, in no instance, has decided that it was a right delegated to it by the Constitution, or that it was inherited from Parliament, or that it was an inherent right pertaining to it as a legislative body, or of "self-preservation." In each instance where the right to exercise the power was claimed, one class of its advocates placed it on the ground of a constitutional grant; another class denied its constitutionality and asserted the doctrine of inherent right or "self-preservation;" a third, in turn, denied both sources of power, and claimed that this right was conferred by parliamentary law; and a fourth class, where political questions were involved, I presume, were willing to assume or deny the authority—right or wrong—without taking the trouble to inquire whether any of these sources conferred the power on the House.

In this very case the right was claimed on at least three separate and distinct grounds by the three distinguished gentlemen who advocated it on the floor of the House.

The first and leading argument maintains the doctrine of inherent right, and declares: "*First.* That the House has power, the same as a court, independent of any statute, to punish for contempt of its authority in all cases of which it had jurisdiction.

"*Second.* That the House is the sole judge whether the facts in a given case constitute a contempt of the House.

"*Third.* That if by order of the House there is a committal for an adjudged contempt of its authority, the commitment is in execution of the judgment and order of the House." (*Cong. Rec.*, Mar. 29, 1876, p. 17.)

The second argument maintained that the House has the power to investigate facts through its committees in aid of its power of impeachment, and has the same right to punish for contempt as a court of justice has. (*Cong. Rec.*, *ib.*, 22.)

Further on, the argument maintains that the imprisonment of the petitioner is not punishment, only detention. The House, as a court, has said to its Sergeant-at-Arms, its marshal: "Detain this witness until he is willing to answer." Now, "I do not regard this as a punishment for contempt," &c. And again: "Nothing short of an amendment to the Constitution can within its proper limits qualify or control the exercise of this *constitutional* power to punish for contempt any more than a statute could change the proportion of members needed for a call of the yeas and nays." (*Cong. Rec.*, *ib.*, 22, 23.)

The third argument maintained the right to this power on the ground of precedent and parliamentary law. The case of *Randall* is cited, and the case of Anderson and of Woods. It then goes on to say: "By a long series of precedents, running far back in English history, each House of Parliament, not as a court, because neither House of Parliament separately was recognized as omnipotent, but each House of Parliament was regarded as having the right, the self-protective right, of committing for contempt."

Again: "As argued by the gentleman from Massachusetts, I say that, right or wrong, this House, for which I claim no judicial powers," &c. (*Cong. Rec.*, p. 25.)

It will be observed that the three legal arguments delivered in the House in support of this right place it on entirely different grounds. It is claimed, too, that the commitment of this petitioner is execution, in consequence of a conviction. (P. 16.) On the other hand this is denied, and it is alleged that the petitioner is only "detained until he is willing to answer." (P. 22.) It is said, "In the exercise of that power this House is the supreme or highest judicial tribunal;" and, on the other hand, "I claim no judicial powers for this House."

The law of the case having in this manner been presented, the House proceeded to vote upon it. The question before the House was not, "Has this House the right to exercise

this power as an 'inherent right,' or as a constitutional right, or by virtue of parliamentary law?" but whether or not the petitioner should be imprisoned for contempt of the House, and it was decided in the affirmative; that is to say, the House decided to exercise the power, but upon what right its action was based the record does not disclose. It does not appear but that if the vote had been taken as to the right of the House to exercise the power on any one of these grounds that it would have been sustained by the House.

I claim, therefore, that the exercise of the power under the circumstances mentioned determines no principle, and is not an authoritative precedent.

In the next place, I maintain that the wrongful exercise of power cannot, in this or any other country claiming to be free, establish a precedent that ought to be regarded as authority. I concede all that may be urged in support of the authority of precedent where the precedent itself is not against law, but I maintain that a succession of wrongs, a train of invaded rights, acquiesced in though they may be however long, can never ripen into virtue and law.

As to precedents, an eminent English jurist has said: "The *practice* of a ruling power in the State is but a feeble proof of its legality. I know not how long the practice of raising ship-money had prevailed before the right was denied by *Hampden;* general warrants had been issued and enforced for centuries before they were questioned in actions by *Wilkes* and his associates, who, by bringing them to the test of the law, procured their condemnation and abandonment. I apprehend that acquiescence on this subject proves, in the first place, too much, for the admitted and grossest abuse of privilege has never been questioned by suits in *Westminster Hall.* The most obvious reason is, that none could have commenced a suit of any kind for the purpose without incurring the displeasure of the offended House, instantly enforced if it happened to be sitting, and visiting all who had been concerned. During the session it must be remembered that

privilege is more formidable than prerogative, which must avenge itself by indictment or information, involving the tedious process of law, while privilege, with one voice, accuses, condemns, and executes. And the order to 'take him,' addressed to the Sergeant-at-Arms, may condemn the offenders to persecution and ruin. Who can wonder that early acquiescence was deemed the lesser evil, or gravely argue that it evinced a general persuasion that the privilege existed in point of law." (Lord *Denman* in *Stockdale* vs. *Hansard*.)

In a case of legislative privilege before Mr. Chief-Justice Parsons, of Massachusetts, he said: "To introduce examples from the British House of Commons cannot much illustrate the subject. The privileges of that House are not derived from any written constitution, but have been acquired by the successful struggles of centuries, directed either against the monarchy or an hereditary aristocracy. The exertions of the Commons have generally been popular, because the people were supposed to reap the fruits of them. In this State we have a written constitution, formed by the people, in which they have defined not only the powers, but the privileges of the house, either by express words or by necessary implication. A struggle for privileges in this State would be a contest against the people to wrest from them what they have not chosen to grant." (*Coffin* vs. *Coffin*, 4 Mass., 1.)

So it is with regard to the Federal Constitution. In it the powers and privileges of the House of Representatives are defined. A struggle for further powers or privileges by the House would be a contest on its part to wrest from the people what they have not chosen to grant.

In support of the claim of inherent power of the House to punish for contempt, it is argued that there are certain attributes essential to the very existence of a legislative body, which incidentally accompany and are included or implied in the clause of the Constitution creating the House of Representatives, and that the power to punish a citizen is one of these attributes.

The first observation I have to offer is, that the House of Representatives is not a legislative body, possessing general powers of legislation. The subjects upon which it exercises its authority are enumerated in the Constitution; all other subjects are excluded from its jurisdiction. The language of the Constitution is: "All legislative powers *herein granted* shall be vested in a Congress," &c.

In the next place, as I have already stated, the House has not adopted a rule prescribing imprisonment or other penalty for contempt of its authority or breaches of its privilege; so that, conceding the power to punish for contempt, the House has failed to define or declare what constitutes the offence, or the nature or extent of the penalty. In a free government like this, where the rights and liberties of the people are protected by law, it is difficult to understand how it can happen that the most sacred right—the right of personal liberty—may be disregarded by the servants of the people under the pretext that something which they call privilege has been assailed, when no man can possibly know what that privilege is. So far as it has been revealed to us, it is some shadowy, undefined, and incomprehensible principle, known to Congressmen only; a power to be invoked by the House in defiance of law, having neither form nor substance, resting on no acknowledged legal foundation, it is assumed by the House without right, and wielded at discretion and in defiance of the courts.

Here is the case of a private citizen, a man holding no public office, in no way connected with the Government, except by his allegiance and the protection it has pledged him, without indictment, without information, no one even daring to make an affidavit that he has violated any law, imprisoned like a malefactor, in a country calling itself free—here, at the seat of Government, in the very shadow of the Capitol!

It is about time that members of the House should begin to consider what are the "privileges" *of a citizen*. In this coun-

try, where "equality of rights" is a fundamental principle of government, where there are no masters but the people, where laws are made to be enforced, and rights are secured by constitutional guaranty, with free schools and a free press, an enlightened civilization, and a lively perception of the right under all circumstances, the people of this country will never reconstruct that barbarous code of law which so long degraded English manhood and scandalized the dark ages by its infamous and disgraceful penalties—the *lex parliamenti* of England.

If that which is considered by the House a breach of privilege is something that deserves punishment, why not make it a crime, and punish the offender according to law? Perfect the criminal code; the power to do this is in Congress; then we will understand what is meant by a breach of privilege, and be careful to avoid committing it.

It is argued that this inherent power to punish contempts belongs *ex necessitate* to the House as a legislative body, just as it belongs to a court; that when this legislative body was created, it took upon itself, by virtue of the Constitution, all the attributes essential to its nature, just as a court, as such, became endowed with all the essential requisites belonging to such tribunal, including the power to punish for contempt of its authority; and the advocates of the power in question assure us that the analogy is perfect.

It will be remembered that the Government of the United States went into practical operation on the 4th of March, 1789. On that day the first President took the oath of office, and the first Congress was convened. At this first Congress an act was passed known as the judiciary act, and in that act it is provided "That all the said courts of the United States shall have power * * * to punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same." (Approved 24th Sept., 1789, 1 Stat., 83.)

If the courts possessed this power by inherent right, why

confer it by statute? And if it were necessary to confer the power on the courts, because without the statute they did not possess it, how does it happen that the House has it without the statute, the analogy, as it is claimed, being perfect?

The statute has ever since remained in force. In the Revision it is made to read as follows:

"Sec. 725. The said courts shall have power to impose and administer all necessary oaths, and to punish by fine or imprisonment, at the discretion of the court, contempts of their authority: *Provided*, That such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person, to any lawful writ, process, order, rule, decree, or command of the said courts."

President Jefferson, in his Manual, which has ever been a law unto the House, discussed this question with all the mastery which his ripe learning, vast experience, and thorough comprehension of the constitutional powers of the House and of Congress, as well as of the nature and character of the Government, have rendered his name illustrious in our history.

Commenting on the case of Duane, he says:

"In debating the legality of this order, it was insisted, in support of it, that every man, by the law of nature, and every body of men possessed the right of self-defence; that all public functionaries are essentially invested with the powers of self-preservation; that they have an inherent right to do all acts necessary to keep themselves in a condition to discharge the trusts confided to them; that whenever authorities are given, the means of carrying them into execution are given by necessary implication; that thus we see the British Parliament exercise the right of punishing contempts, all the

State legislatures exercise the same power, and every court does the same; that if we have it not, we sit at the mercy of every intruder who may enter our doors or galleries, and by noise and tumult render proceeding in business impracticable; that if our tranquility is to be perpetually disturbed by newspaper defamation, it will not be possible to exercise our functions with the requisite coolness and deliberation; and that we must, therefore, have a power to punish these disturbers of our peace and proceedings. To this it was answered that the Parliament and courts of England have cognizance of contempts by the express provisions of their law; that the State legislatures have equal authority, because their powers are plenary, they represent their constituents completely, and possess all their powers, except such as their constitutions have expressly denied them; that the courts of the several States have the same powers by the laws of their States, and those of the Federal Government by the same State laws adopted in each State, by a law of Congress; that none of these bodies, therefore, derive those powers from natural or necessary right, but from express law; that Congress have no such natural or necessary power, or any powers but such as are given them by the Constitution; that that has given them, directly, exemption from personal arrest, exemption from question elsewhere for what is said in their House, and power over their own members and proceedings; for these no further law is necessary, the Constitution being the law; that moreover, by that article of the Constitution which authorizes them 'to make all laws necessary and proper for carrying into execution the powers vested by the Constitution in them,' they may provide by law for an undisturbed exercise of their functions. For example, for the punishment of contempts, of affrays or tumult in their presence, &c.; but, till the law be made, it does not exist, and does not exist from their own neglect; that in the mean time, however, they are not unprotected, the ordinary magistrates and courts of law being open and competent to punish all unjustifiable disturbances or defamations; and even their own sergeant, who may appoint deputies *ad libitum* to aid him, is equal to small disturbances; that in requiring a previous law, the Constitution had regard to the inviolability of the citizen, as well as of the member; as, should one House, in the regular form of a bill, aim at too broad privileges, it may be checked by the other, and both by the President; and also

as the law being promulgated, the citizen will know how to avoid offence. But, if one branch may assume its own privileges without control—if it may do it on the spur of the occasion, conceal the law in its own breast, and after the fact committed, make its sentence both the law and the judgment on that fact; if the offence is to be kept undefined, and to be declared only *ex re nata* and according to the passions of the moment, and there be no limitation either in the manner or measure of the punishment, the condition of the citizen will be perilous indeed." * * *

"Perhaps Congress, in the mean time, in their care for the safety of the citizen, as well as that for their own protection, *may declare by law* what is necessary and proper to enable them to carry into execution the powers vested in them, *and thereby hang up a rule for the inspection of all*, which may direct the conduct of the citizen, and at the same time test the judgments they shall themselves pronounce in their own case."—(Jefferson's Manual, sec. III.")

III.

THE REFUSAL TO ANSWER IS BY LAW A MISDEMEANOR.

During the first half century of the Government, the House of Representatives had, on several occasions, exercised the power to punish for contempts; and while so exercising it, there were at all times grave doubts as to the authority of the House to assume the combined functions of party, prosecutor, witness, judge, and executioner, when the law peremptorily seggregated these functions. Many of our most distinguished statesmen, like Mr. Jefferson, denied this *silent* grant of imprisoning power, or that any speculation or inference, setting up as an excuse for its exercise, some latent meaning of the text of the Constitution, implying the right to do what its express language prohibited, was an unsafe rule by which to interpret the fundamental law.

This contrariety of opinion, however, culminated in 1857, by the formulating of the opinion of the two Houses of Congress on the subject of contempts, in cases like the one under consideration; and it was declared by statute to be a misde-

meanor to refuse to testify before a committee of either House, punishable by fine and imprisonment "in addition to the pains and penalties now existing," without, however, defining what said pains and penalties were supposed to be.

By this compromise, the friends of constitutional liberty had the satisfaction of knowing that a recusant witness could have a trial by jury, and the advocates of parliamentary privilege were content, because the House could, in the meantime, commit him to jail for contempt. It was shortly discovered, however, that a citizen might be punished twice for the same offence; or, having been punished by the House, the jury on the trial might acquit, and by their verdict declare that the party which the House had punished had not committed the offence. Besides, the inhibition of double punishments was positive, and the implied permission to inflict them in the face of the prohibition was as obscure as the implied constitutional authority to seize the person or papers of a citizen without warrant on oath or affirmation, or to imprison a witness for refusing to disclose his private business or surrender his private papers.

Upon a revision of the laws, this act was amended by striking out the words, "in addition to the pains and penalties now existing," making the act a misdemeanor punishable by indictment in a court of competent jurisdiction, *and nowhere else.*

Sec. 102, Rev. Statutes, provides:

"Every person who, having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House or any committee of either House of Congress, wilfully makes default, or who having appeared refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than one thousand dollars nor less than one hundred dollars, and imprisonment in a common jail for not less than one month nor more than twelve months.

"Sec. 103. No witness is privileged to refuse to testify to any fact, or to produce any paper respecting which he shall be examined by either House of Congress, or by any committee of either House, upon the ground that his testimony to such fact or his production of such paper may tend to disgrace him or otherwise render him infamous.

"Sec. 104. Whenever a witness summoned as mentioned in section one hundred and two fails to testify, and the facts are reported to either House, the President of the Senate or Speaker of the House, as the case may be, shall certify the fact under the seal of the Senate or House to the District attorney for the District of Columbia, whose duty it shall be to bring the matter before the grand jury for their action."

The wisdom of this legislation is beyond cavil or question. Where else than in a court of justice should a man be tried, when charged with committing an offence? What are the safeguards that will protect the accused on trial before a popular assembly inflamed by passion or prejudice and irresponsible for its acts? For this purpose courts were established, and the right of a speedy trial by an impartial jury guaranteed forever.

Where liberty is at stake, it is more in harmony with our instincts, education, and love of fair play, that the accused should have the right to meet his witnesses face to face, and be declared guilty or innocent by a jury of his peers. It is a part of our theory of government, the very essence of constitutional freedom, and so long as the Constitution is observed in letter and spirit, and each department performs its allotted functions without encroachment upon any other, our happiness will continue and our prosperity increase; and when this High Court, to whose judgments a great nation yields its willing obedience, declares that by the law of this country no man, be he high or low, rich or poor, shall be deprived of his liberty, except by the judgment of a court of justice, or the sentence of a court-martial, all good citizens will realize with a more lively appreciation than ever before the inesti-

mable value of the Constitutional Government under which they live.

I am unable to conjecture a reason that would justify the wresting of this case from the courts. I have read with attention the arguments in its favor, but I fail to see why the same reasoning that gives the power to the House of Representatives does not give like power to every officer of the Government; and if that be granted, what becomes of the liberty of the citizen? England had her Star Chamber and Venice its Council of Ten; the "Holy Inquisition" burned at the stake or tortured its victims at will; the civilized world stood appalled at the havoc of Robespierre and the "Mountain." These were the fruits of despotism; life was endangered and liberty had no protection. Men were imprisoned without warrant and condemned without law. The safeguards were unheeded; latent, undefined power was claimed to authorize the subversion of established law. The doctrine of implication was most practically and effectually asserted. Like the House of Representatives, these tribunals did what the consolidated power of their governments could not lawfully accomplish.

But is claimed that the implied constitutional authority of the House to punish for contempt exclusively vests it there, and therefore Congress had no power to transfer the jurisdiction to the courts, and that the statute is unconstitutional and void.

Let it be granted that there was an express delegation of power to the House to imprison for contempt; that possessing this power the Congress enacted a law transferring the jurisdiction to the courts. Did the House, therefore, by consenting to the passage of the law, divest itself of the power to punish, or did it simply prescribe the mode by which it would exercise it, by certifying the contempt to the law officer of the Government, for indictment, trial, and punishment, and at the same time avoid the scandal of acting as a judge in its own case, if, as it has been claimed, the act is an offence

against the House? In such case it might be said that instead of divesting itself of the power to punish contempt the House was exercising the power by making it a misdemeanor, and punishing it as such.

If the obstruction or interruption of the business of the House is an offence against the House, a like contempt of the Senate would be an offence against the Senate, and by like principle, the obstruction or interruption of the official business of the Executive would be an offence against the President; and so as to heads of Departments and bureaus, and extending through the civil list, from the President down to the village postmaster, clothed with the constitutional power to imprison for contempt, the act being an offence against the postmaster.

Thus there would be introduced a new series of offences, punishable in a manner unknown to the Constitution, and free from all restraints which that instrument provides for—the safety and protection of the citizen on trial before the tribunals ordained by law.

That the framers of the Constitution intended that all offences, save in cases of impeachment and in the Army and Navy, should be tried in courts of justice, and in no other place, is evidenced by the fact that all the safeguards which environ the accused are those that apply only to judicial proceedings. Had it been intended to confer this jurisdiction on the House or Senate, can it be presumed that the accused would have been left to the mercy of a popular assembly inflamed by passion, prejudice, or political excitement?

The horrors of the French revolution and its revolutionary tribunal were of too recent date to have escaped the memory of the framers of the Constitution. The value of a fair trial was appreciated, and abundant precaution taken to secure it to all offenders for all time. Can it be true, then, that the Constitution only protects the accused from the unlawful acts of the judicial officers, leaving to the House and Senate, respectively, full power to arrest and imprison citizens at dis-

cretion? Observe its provisions in case of impeachment, where the judicial power is expressly conferred. See how carefully the rights of the accused are guarded, and even then no judgment of conviction can be rendered without the concurrence of two-thirds of the members present.

I maintain therefore that this statute is constitutional and effective.

"Congress, in their care for the safety of the citizen, as well as that for their own protection, have declared by law what is necessary and proper to enable them to carry into execution the powers vested in them, and thereby hung up a rule for the inspection of all, which may direct the conduct of the citizen, and at the same time test the judgments they shall themselves pronounce in their own case."

The act defines the offence and fixes the penalty, and where that is done no other punishment, be it greater or less, can legally be inflicted, (*Scrinegrowe* vs. *State*, 1 Chand., 48; *Haney* vs. *State*, 5 Wis., 529;) and the same is true in regard to matters of contempt, (*Brinkley* vs. *Commonwealth*, 2 J. J. *Marsh*, 572; *Ex parte Edwards*, 11 Fla., 174; *Dunham* vs. *State*, 6 Iowa, 245; *People* vs. *Liscomb*, 60 N. Y., 559.)

The act for which the plaintiff was imprisoned is the act defined by the statute; it is not only the same act, but the same offence, and it is needless to cite authorities forbidding the infliction of double penalties for the same offence against the same sovereignty.

THE CASE OF ANDERSON VS. DUNN.

The decision in the above case (6 Wheaton, 204) is relied on by the defendants as maintaining the doctrine of the right of the House of Representatives to punish by imprisonment a citizen adjudged by it to be in contempt of said House.

That case, although it asserts the authority of the House

(as the law then stood,) to imprison a recusant witness, is clearly distinguishable from the one now before the court.

In that case, Anderson was convicted of a contempt by the House, and sentenced to be reprimanded, which was done, and he was discharged. The action was for the duress antecedent to his trial, while he was detained as a witness in the custody of the Sergeant-at-Arms.

In this case, the plaintiff was convicted of a contempt of the House, and sentenced to imprisonment in the District jail, and the action is brought to recover for the alleged unlawful imprisonment imposed by the sentence.

In that case, the question raised by the pleadings was, "Whether the House of Representatives can take cognizance of contempts committed against themselves under any circumstances?" In this case the right of the House to take action in this class of contempts is conceded, and having ascertained the fact, it is to be certified by the Speaker of the House to the District attorney here for punishment by indictment. (Sec. 104, Rev. Stat., 17.)

The injury complained of was the duress, not the punishment; but as the validity of the warrant under which Anderson was detained depended upon the power of the House to inflict punishment, the court considered the question as to the power of the House to punish for contempts.

Mr. Justice JOHNSON delivered the opinion.

It was held that there is no power given by the Constitution to either House to punish for contempts, except when committed by their own members. That if such a power exists it must be derived from implication, and that the genius and spirit of our institutions are hostile to the exercise of implied powers. That each grant of power draws after it auxiliary and subordinate powers vital to its exercise.

That discretion must be reposed somewhere, and security against its abuse must rest on responsibility and stated appeals to public approbation; and where all power is derived from the people and is surrendered to them by their servants

at short intervals, the liberty of the individual can be in little danger except from alarm by the monsters of the imagination.

That the sole end and aim of all our institutions is the safety and happiness of the citizen. That the science of government is the most abstruse of all sciences, and practically consists in little more than the exercise of a sound discretion, applied to the exigencies as they arise. That it is the science of experiment.

That it is a maxim that the public functionaries must be left at liberty to exercise the powers which the people have intrusted to them.

That the casual conflict with the rights of individuals is no reason to be urged against the exercise by these functionaries of the powers necessary to the attainment of the end for which they were created.

That courts of justice are universally acknowledged to be vested by their very creation with power to impose silence, respect, and decorum in their presence and submission to their mandates, and to preserve themselves and their officers from the approach of insults and of pollution.

That the courts of justice of the United States are vested by express statute provision with power to fine and imprisonment for contempt.

That they would exercise the power without the aid of the statute in cases to which such statute provisions may not extend; that such statute is a legislative assertion of the right as incidental to a grant of judicial power, and is only an instance of abundant caution, or a legislative declaration, that the power of punishing for contempt shall not extend beyond its acknowledged limits of fine and imprisonment.

That if it be claimed that, resting this power on the plea of necessity, the executive and any co-ordinate and even subordinate branches of the Government may resort to the same justification, and assume to themselves, in the exercise of this power, "the most tyrannical licentiousness," it is re-

plied: This is unquestionably an evil to be guarded against, and if the doctrine may be pushed to that extent, "it must be a bad doctrine, and is justly denounced." But what is the alternative? The argument leads to the total annihilation of the power of the House of Representatives to guard itself from contempts, and leaves it exposed to every indignity and interruption that rudeness, caprice, or even conspiracy, may meditate against it. That a deliberate assembly, clothed with the majesty of the people, should not possess the power to suppress rudeness or repel insult "is a suggestion too wild to be suggested."

That there is no reason why an ungranted, unlimited, and undefined power should not be exercised without as well as within the walls of the House.

That contempts from their very nature admit of no precise definition.

That the extent of the punishing power is "the least possible power adequate to the end proposed."

That as the legislative body ceases to exist on the moment of its adjournment or periodical dissolution, the imprisonment must terminate with that adjournment.

That the Constitution was framed in and for an advanced state of society, and rests at every point on received opinions and fixed ideas, and therefore the House will not exceed its powers by inflicting corporal punishment or death, or exercise it in cases affecting the liberty of speech and of the press.

That the Constitution is not a new creation, but a combination of existing materials, whose properties and attributes were familiarly understood, and it is not therefore reasoning upon things as they are, to suppose that any deliberative assembly constituted under it would ever assert any other rights and powers than those which had been established by long practice and conceded by public opinion.

Melancholy, also, would be that state of distrust which rests not a hope upon a moral influence. The argument that the express grant of power to punish its members excludes

the implied power to punish others, not members, proves too much. All the punishing power exercised by Congress, except such as relates to piracy, is derived by implication.

Neither analogy nor precedent would support the assertion that on this foundation of necessity might be raised a superstructure of implied powers in the executive and every other department, and even ministerial officer of the Government.

That the process of the House reaches to all points within the United States.

The foregoing embrace substantially the points upon which the conclusion of the opinion was based; and, with all due respect, I desire to submit a few observations on such of them as, in my judgment, the court may deem it proper to consider in a review of that opinion.

It is not specifically stated in the opinion that the power in question is an implied grant to the House, nor is it specifically denied. It is said that "It is certainly true that there is no power given by the Constitution to either House to punish for contempts, except when committed by their own members."

Unless this means that there is no power expressly granted, it is of course a denial of its existence—for neither House can claim power not given by the Constitution.

If such power exists it must be derived from implication, and the genius and spirit of our institutions are hostile to the exercise of implied powers, is the second proposition, which is followed by the statement that there is no grant of powers in the Constitution which does not draw after it others not expressed but vital to its exercise.

The inference would follow that the power in question belongs to the latter category, but it is only inference.

If this be so, I am unable to discover a substantive grant of power to which this is "an auxiliary or subordinate," or "vital to its exercise;" clearly it is not necessary to enable two-thirds of the members of the House to expel a member, or to punish him for disorderly conduct, that it should have the power to punish a citizen for refusing to testify.

It is true that the exercise of discretion must be left somewhere, but the power to exercise it, and the sphere in which it may be exercised, are, I think, restricted by constitutional limits. The legislative bodies, the judicial and executive officers, exercise the fullest discretion within their respective jurisdictions, but no one of these may, by an exercise of discretion, encroach upon the jurisdiction of any of the others.

While it may be true that the science of government has but few fixed principles, and is but the science of experiment, there are certain fundamental principles on which free government rests, and which are strikingly exemplified by our own Constitution, that are immutable.

It is certainly true that the conduct of particular individuals ought not to obstruct the exercise of the lawful powers of the public functionaries; but, if it is meant by the assertion, "Nor is a casual conflict with the rights of particular individuals any reason to be urged against the exercise of such powers," to be taken in a literal sense, if it mean that an individual has no redress for the invasion of his rights by a conflict with the acts of a public officer in the discharge of his duties, then there is something wrong in our political system which ought to be repaired. If it mean that private rights are subordinated to public weal or public necessity, with compensation to the party injured, it is clearly the fact; but if it mean that rights not forfeited or surrendered under the compact may be invaded in a conflict with Government functionaries, in the exercise of their discretionary powers, I respectfully submit that it is otherwise.

If "the wretch on the gallows" had a fair trial and was legally convicted, his execution was not an invasion of his rights; so, if the plaintiff, Anderson, had been arrested by lawful process, it would not have been "a conflict with his right," if it appear that he had already surrendered that right which is the very question we have all the time been considering.

The statute authorizing courts of justice to fine and im-

prison for contempt is held to be a legislative assertion of this right as incidental to a grant of judicial power, and a legislative declaration that the power of punishing for contempts shall not extend beyond its acknowledged limits of fine and imprisonment.

This would seem to suggest a question as to the force of the statute; does it limit the power vested in the courts by the implied powers of the Constitution? Certainly not; for if the courts have it in a constitutional way, it could not be abridged by statute. Neither was it necessary as declaratory of the measure of punishment, for its "known and acknowledged limits," the court declares, are those of fine and imprisonment.

If this right is incidental to a grant of judicial power, as applied to courts of justice, and the House has it, there must be somewhere in the Constitution a grant of judicial power to the House to which this right is incident. This I have been unable to discover.

In commenting on the argument that this power in the House may not be asserted on the plea of necessity—that the principle would extend the power to the executive branches and officers of the Government—the opinion goes on to say: "This is, unquestionably, an evil to be guarded against; and, if the doctrine may be pushed to that extent, it must be a bad doctrine, and is justly denounced. But what is the alternative? The argument obviously leads to the total annihilation of the power of the House of Representatives to guard itself from contempts, and leaves it exposed to every indignity and interruption that rudeness, caprice, or even conspiracy, may meditate against it."

If I correctly understand this proposition, it is an assertion that a denial of this power in the House, *as a necessity*, would "annihilate" its power to guard itself from contempts. In other words, that its right of self-protection, to preserve order, remove intruders, or quell disturbance, by its Sergeant or his deputies, would be destroyed.

I have hitherto attempted to point out the difference be-

tween the power of self-preservation, which pertains to the House, and the power to inflict punishment, which is a judicial power. I have conceded to it the power to protect itself from all impediments to the due course of its proceedings, and therefore to remove obstructions to its deliberations, and to defend itself from intrusion and insult; but that is a very different thing from assuming to punish by imprisonment.

This distinction is forcibly illustrated in the case of *Doyle* vs. *Falconer*, (4 Moore's P. C. C., 203.)

That case was an action of trespass for assault and false imprisonment against the Speaker and ten other members of the lower House of Assembly of the Island of *Dominica*. The plaintiff, a member of the House, was adjudged guilty of contempt for disorderly conduct, and by its order was imprisoned in the common jail by its Sergeant, under the Speaker's warrant.

The special pleas justified under the power of the House; the plaintiff demurred. The cause was tried before the Chief-Justice by a special jury on the 7th day of July, 1864, and a verdict given for the plaintiff, with £770 damages. The case was appealed to Her Majesty in Council, and upon hearing the appeal was dismissed with costs.

The judgment was delivered by Sir JAMES COLVILLE.

After stating the case and the questions involved, he said:

"The first question, affecting as it does the privileges of the Legislative Assemblies in many of the dependencies of the Crown, is one of importance. When it first arose before this committee, in the case of *Beaumont* vs. *Barrett*, (1 Moore's P. C. C., 59,) the learned judges then sitting decided broadly that the power of punishing contempts is inherent in every assembly that possesses a supreme legislative authority, whether they are such as are a direct obstruction to its due course of proceedings, or such as have a tendency indirectly to produce such obstruction; and therefore, that the Legislative Assembly of *Jamaica* had the power of imprisoning for a contempt by the publication of a libel.

"Again, in *America*, the Supreme Court of the *United States*, a tribunal whose judgments are entitled to the highest

respect, held, in the case of *Anderson* vs. *Dunn*, that the House of Representatives had, by necessary implication, a general power of punishing and committing for contempts notwithstanding that the *lex scripta*, 'the Constitution of the United States,' had expressly conferred upon it a power limited to the punishment of contempts when committed by its own members.

"It is admitted, however, that the case of *Kielly* v. *Carson*, (4 Moore's P. C. C., 63,) which overruled that of *Beaumont* vs. *Barrett*, and has been followed by that of *Fenton* vs. *Hampton*, (11 Moore's P. C. Cases, 347,) must here be taken to have decided conclusively that the Legislative Assemblies in the British colonies have, in the absence of express grant, no power to adjudicate upon, or punish for, contempts committed beyond their walls. The case is one which, having regard to the constitution of the committee before which it was argued for the second time, their lordships must accept as an authority of singular weight. And if the elaborate judgment which was then pronounced has in terms left open the question which is raised in the present case, it has stated principles which go far to afford the means of determining that question.

"The privileges of the House of Commons, that of punishing for contempt being one, belong to it by virtue of the *lex et consuetudo Parliamenti*, which is a law peculiar to and inherent in the two Houses of Parliament of the United Kingdom. It cannot therefore be inferred from the possession of certain powers by the House of Commons, by virtue of that ancient usage and prescription, that the like powers belong to legislative assemblies of comparatively recent creation in the dependencies of the Crown.

"Again, there is no resemblance between a Colonial House of Assembly, being a body which has no judicial functions, and a court of justice, being a court of record. There is therefore no ground for saying that the power of punishing for contempt, because it is admitted to be inherent in the one, must be taken by analogy to be inherent in the other.

"If, then, the power assumed by the House of Assembly cannot be maintained by analogy to the privileges of the House of Commons, or the powers of a court of record, is there any other legal foundation upon which it may be rested? It has not, as both sides admit, been expressly granted. The learned counsel for the appellants invoked the principles of the common law, and as it must be conceded that the common

law sanctions the exercise of the prerogative by which the Assembly has been created, the principle of the common law, which is embodied in the maxim, "*Quando lex aliquid concedit, concedere videtur et illud, sine quo res ipse esse non potest,*" *applies to the body so created.* The question therefore is reduced to this: Is the power to punish and commit for contempts committed in its presence one necessary to the existence of such a body as the Assembly of *Dominica,* and the proper exercise of the functions which it is intended to execute? It is necessary to distinguish between a power to punish for a contempt, which is a judicial power, and a power to remove any obstruction offered to the deliberations or proper action of a legislative body during its sitting, which last power is necessary for self-preservation. If a member of a colonial assembly is guilty of disorderly conduct in the house while sitting, he may be removed, or excluded for a time, or even expelled; but there is a great difference between such powers and the judicial power of inflicting a penal sentence for the offence. The right to remove for self-security is one thing, the right to inflict punishment is another. The former is, in their lordships' judgment, all that is warranted by the legal maxim that has been cited, but the latter is not its legitimate consequence. To the question, therefore, on which this case depends, their lordships must answer in the negative. If the good sense and conduct of the members of colonial legislatures prove, as in the present case, insufficient to secure order and decency of debate, the law would sanction the use of that degree of force which might be necessary to remove the person offending from the place of meeting, and to keep him excluded. The same rule would apply, *a fortiori,* to obstructions caused by any person not a member. And whenever the violation of order amounts to a breach of the peace, or other legal offence, recourse may be had to the ordinary tribunals.

"It may be said that the dignity of the assembly exercising supreme legislative authority in a colony, however small, and the importance of its functions, require more efficient protection than that which has just been indicated; that it is unseemly or inconvenient to subject the proceedings of such a body to examination by the local tribunals; and that it is but reasonable to concede to it a power which belongs to every inferior court of record. On the other hand, it may be urged, with at least equal force, that the power contended for is of a high and peculiar character; that it is in derogation of the liberty of the subject, and carries with it the anomaly of

making those who exercise it judges in their own cause, and judges from whom there is no appeal; and that, if it may be safely entrusted to magistrates, who would all be personally responsible for any abuse of it to some higher authority, it might be very dangerous in the hands of a body which, from its very constitution, is practically irresponsible.

"Their lordships, however, are not at liberty to deal with considerations of this kind. There may or may not be good reasons for giving, by express grant, to such an assembly as this, privileges beyond those which are legally and essentially incident to it. In the present instance this possibly might have been done by the instrument creating the assembly; since *Dominica* was a conquered or ceded colony, and the introduction of the law of *England* seems to have been contemporaneous with the creation of the assembly. It may also be possible to enlarge the existing privileges of the assembly by an act of the local legislature, passed with the consent of the Crown, since such an act seems to be within the 3d section of the recent statute, 28th and 29th *Vict.*, c. 63. That extraordinary privileges of this kind, when regularly acquired, will be duly recognized here, is shown by the recent case of *Dill* vs. *Murphy*, (1 Moore's P. C. Cases, [N. S.,] 487.) But their lordships, sitting as a court of justice, have to consider not what privileges the house of assembly of *Dominica* ought to have, but what by law it has. In order to establish that the particular power claimed is one of those privileges, the appellants must show that it is essential to the existence of the assembly, an incident '*sine quo res ipsa esse non potest.*' Their lordships are of opinion that it is not such an incident.

"This being their lordship's judgment, the foundation of the justification pleaded fails; and it is unnecessary for them to consider at any length the subordinate question of the sufficiency of the warrants."

Upon this opinion and the authorities I have cited, and the principles I have endeavored to illustrate, I maintain, with all respect, that there is no power vested in the House of Representatives to punish by imprisonment for contempt of its authority, and that a denial of this implied authority would not "lead to the total annihilation of the power of the House of Representatives to guard itself from contempts, and leave it exposed to every indignity and interruption that rudeness, caprice, or even conspiracy, may meditate against it."

The description of a deliberative assembly which, in the opinion of the court in the case of *Anderson* vs. *Dunn*, could safely be entrusted with this power, is: "A deliberative assembly, clothed with the majesty of the people, and charged with the care of all that is dear to them; composed of the most distinguished citizens, selected and drawn together from every quarter of a great nation—whose deliberations are required by public opinion to be conducted under the eye of the public, and whose decisions must be clothed with all the sanctity which unlimited confidence in their wisdom and purity can inspire," (p. 68.)

If it could be known that the House of Representatives is, and would always remain, a deliberative assembly of that description, it would be a reasonable argument in support of giving to it the power in question, but would not in any way tend to show that such power existed.

But the framers of the Constitution had grave doubts as to whether the House of Representatives would, at all times, "be composed of the most distinguished citizens, whose decisions must be clothed with all the sanctity which unlimited confidence in their wisdom and purity can inspire," for they expressly provided for the punishment and expulsion of its members, and the criminal statutes, out of abundant caution, made provision for the punishment of members of Congress for offences committed in their official character, while it has occasionally happened that the House itself has set on foot investigation as to the conduct of certain of its members touching questionable transactions.

To concede absolute perfection in the members of the House is to deny that they are human; and, after all that may be said, they are but men, and their certificate of election gives them no exemption from the frailties of human nature. And when it is said that the legislative body is "clothed with the majesty of the people, and charged with the care of all that is dear to them," it must have reference to an assembly that has general powers of legislation, and complete power of supervision over the welfare of the citi-

zen; for, by the Constitution, the power is granted to Congress, not to the House exclusively, to legislate upon such matters as the States and the people have entrusted to the general Government, while the remainder is reserved to the States and to the people.

In controverting the argument that the express grant of power to punish its own members raises an implication against the power of the House to punish any other than its own members, the court said: "This argument proves too much, for its direct application would lead to the annihilation of almost every power of Congress. To enforce its laws upon any subject without the sanction of punishment is obviously impossible. Yet there is an express grant of power to punish in one class of cases, and one only; and all the punishing power exercised by Congress in any cases, except those which relate to piracy and offences against the laws of nations, is derived from implication."

Article 3 of the Constitution gives to Congress "the power to declare the punishment of treason;" Article 1, the power "to provide for the punishment of counterfeiting the securities and current coin of the United States," and, by the same section, "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof."

On page 67 the court say: "Where all power is derived from the people, and public functionaries at short intervals deposit it at the feet of the people, to be resumed again only at their will, individual fears may be alarmed by the monsters of the imagination, but individual liberty can be in little danger."

The case of Patrick Woods has been cited by counsel for defendants as an authority in this case.

In that case Woods was arrested by order of the House for an assault committed on the person of a member of the House, at a distance of one hundred and twenty miles from

the Capitol; and "for his offence" it was ordered that "he be punished by imprisonment in the jail of the District of Columbia, as other criminals are, for three months," and the order to the warden of the jail contained this clause: "And you will not surrender said Woods to any authority except that issuing from said House of Representatives until the expiration of his sentence, without further orders."

The order directing the imprisonment was made by the House on the 7th day of July, and on the 15th day of the same month the House adjourned *sine die*, Woods remaining in jail until the expiration of his sentence.

Here was a case where a personal encounter, between a member and a citizen, was adjudged by the House to be a breach of privileges, although it occurred at a distance of more than one hundred miles from the District of Columbia.

Not only that, but the punishment was ordered and executed in the face of the decision of this court in the case I am considering, which decides that such "imprisonment must terminate with the adjournment." (P. 70.)

With reference to the term of imprisonment in cases of this character, the court say:

"And even to the duration of imprisonment, a period is imposed by the nature of things, since the existence of the power is indispensable to its continuance; and although the legislative power continues perpetual, the legislative body ceases to exist on the moment of its adjournment or periodical dissolution. It follows, that imprisonment must terminate with that adjournment."

To this I respectfully submit, that if the maxim that "the Senate never dies" is to be accepted as a truth, a term of imprisonment fixed by that body as a punishment for a contempt would be a perpetual punishment.

For the reasons stated, I respectfully submit that the judgment of the supreme court of the District of Columbia should be reversed.

N. L. JEFFRIES.
for Plaintiff in Error.

Supreme Court of the U. S.

HALLET KILBOURN,
Plaintiff in Error,
vs.
JOHN G. THOMPSON, et al.
Defendants in Error.

No. 144.
October Term, 1879.

In Error to the Supreme Court of the District of Columbia.

BRIEF FOR DEFENDANTS.

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In Supreme Court of the United States.

OCTOBER TERM, 1879.

HALLET KILBOURN,
Plaintiff in Error,

vs.

JOHN G. THOMPSON *et al.*,
Defendants in Error.

No. 144.

In Error to the Supreme Court of the District of Columbia.

The record shows the following facts:

On the 1st day of August, 1876, the plaintiff, Hallet Kilbourn, brought an action of trespass against Michael C. Kerr, John G. Thompson, John M. Glover, Jeptha D. New, Burrell B. Lewis, and A. Herr Smith, in the Supreme Court of the District of Columbia.

In his declaration he alleged that the defendants had, with force and arms, assaulted and beat the plaintiff, and caused him to be imprisoned in the jail of the District of Columbia, without cause, for the space of forty-five days, and he asked for damages in the sum of one hundred and fifty thousand dollars.

Michael C. Kerr died before service was made on him. The defendants, Glover, New, Lewis, and Smith, pleaded jointly: 1st. The general issue; and, 2d. A special plea which alleged that, at the time the said supposed grievances were committed upon the plaintiff, the Congress of

the United States was in session at Washington City; that they were members of the House of Representatives, and as such were required to obey its orders; that their co-defendant, Thompson, was the Sergeant-at-Arms of the House, and as such was authorized and required, by the rules and orders of the House, to execute its commands, and to serve all such process as should be ordered by the House and directed by the Speaker of the same; that their co-defendant, Kerr, was the Speaker of the House, and as such was authorized to sign and seal, with the seal of the House, all warrants issued by order of the House; that one George M. Adams was the Clerk of the House, and as such required to attest all warrants issued under the order of the House; that the House, on the 24th of January, A. D. 1876, adopted a preamble and resolution, which recited that the United States was a creditor of the firm of Jay Cooke & Co., then in bankruptcy, resulting from the improvident deposits of the Secretary of the Navy of the United States of the public monies with said firm; that the matter known as the real estate pool was only partially inquired into by the late joint select committee to inquire into the affairs of the District of Columbia, in which the said Jay Cooke & Co. had a large interest; that the trustee of the estate of said firm of Jay Cooke & Co. had recently made a settlement of the interest of said firm, with its associates, to the disadvantage of the United States. The resolution directed that a special committee of five members, to be selected by the Speaker, should be appointed to inquire into the nature and history of said real estate pool, and the character of said settlement, with the amount of property involved in which the said Jay Cooke & Co. were interested, and the amount paid, or to be paid, in said settlement, with power to send for persons and papers, and to report to the House their proceedings in the premises.

The plea further alleged, that the said defendants were duly appointed, by the Speaker, members of said committee, together with one Henry O. Pratt, also a member of said House; that said committee duly organized and proceeded to make the inquiry directed by the resolution, and, to that end, caused a subpœna to be issued for the said Hallet Kilbourn, plaintiff, to appear before said committee to testify touching said matters of inquiry, and to bring with him certain records, papers and maps relating to said inquiry, and particularly described in the said subpœna and the exhibit thereto attached; that the said plaintiff did appear before said committee, in obedience to the command of said subpœna, and was examined by the committee touching said matter of inquiry, and was asked the following questions: "Will you state where each of the five mem-"bers reside, and will you please state their names?" That said questions were *pertinent* and *material* to the question of inquiry before said committee, but that the said plaintiff knowingly and willfully refused to answer the same.

The plea further alleged that the said Kilbourn, though ordered by said subpœna to bring with him and produce before the committee certain records, papers and maps relating to said inquiry, still, when asked the following question by said committee—"Mr. Kilbourn, are you now pre-"pared to produce, in obedience to the subpœna *duces* "*tecum*, the records which you have been required by the "committee to produce?"—which records, papers and maps were pertinent to the question of inquiry, knowingly and willfully refused to produce said records papers and maps; that thereafter, and on the 14th of March, 1876, the said committee reported to the House the aforesaid facts in reference to the said plaintiff, and his refusal to answer said questions, and produce said records; and further, that "The committee are of opinion and report that it is

"necessary for the efficient prosecution of the inquiry "ordered by the House, that the said Hallet Kilbourn "should be required to respond to the subpœna *duces tecum* "and answer the question which he has refused to answer, "and that there is no sufficient reason why the witness "should not obey said subpœna, *duces tecum*, and answer "the questions which he has refused to answer, and "that his refusal is in contempt of this House;" that the House of Representatives thereupon ordered that the Speaker should forthwith issue his warrant, directed to the Sergeant-at-Arms, commanding him to take into custody the body of the said Hallet Kilbourn, wherever to be found, and the same to have forthwith before the House at the bar thereof, to answer why he should not be punished as guilty of a contempt of the dignity and authority of the said House; that the said Speaker did thereupon, on the said 14th of March, 1876, duly issue his warrant, directed to said Thompson, Sergeant-at-Arms, and delivered the same to him, directing him to take into his custody the body of the said Hallet Kilbourn, and to bring him forthwith before the House, to answer to the said charge of contempt; and that the said Sergeant-at-Arms did thereupon arrest the said Kilbourn and bring him to the bar of the House.

The plea further alleged that the said defendants did not, in any manner, assist in the arrest and imprisonment of the said plaintiff, nor were they in any way concerned in the same; nor did they order or direct the same, except by their participation as members of the House of Representatives, and of said special committee, in the acts and proceedings aforesaid, of said committee and House, as members thereof.

The plea further alleged that the plaintiff was brought to the bar of the House by the Sergeant-at-Arms, and heard in his defense, and was inquired of by the Speaker

whether he was then willing to answer the questions and produce the records, as hereinbefore set forth, but he knowingly and wilfully refused to answer the questions or produce the records, whereupon the House adopted the following resolution:

"*Resolved*, That Hallet Kilbourn, having been heard "by the house, pursuant to the order heretofore made re- "quiring him to show cause why he should not answer "questions propounded to him by a committee, and respond "to *subpœna duces tecum* by obeying the same, and hav- "ing failed to show sufficient cause why he should not an- "swer such questions and obey said *subpœna duces tecum*, "be, and is, therefore, considered in contempt of said "House because of said failure.

"2d. *Resolved*, That, in purging himself of the contempt "for which Hallet Kilbourn is now in custody, the said "Kilbourn shall be required to state to the House whether "he is now willing to appear before the committee of the "House, to whom he has hitherto declined to obey a cer- "tain *subpœna duces tecum*, and answer certain questions, "and obey said *subpœna duces tecum*, and make answer to "said questions; and if he answers that he is ready to ap- "pear before said committee and obey said *subpœna duces* "*tecum*, and answer said questions, then said witness shall "have the privilege to so appear, and obey and answer "forthwith, or so soon as said committee can be convened, "and that in the mean time the witness remain in custody; "and in the event that said witness shall answer that he is "not ready to so appear before said committee, and obey "said *subpœna duces tecum*, and make answer to said ques "tions, as aforesaid, then that said witness be recommitted "to the said custody for the continuence of the said con- "tempt; and that such custody shall continue until the said "witness shall communicate to this House, through said "committee, that he is ready to appear before said commit-

"tee and make such answer and obey said *subpœna duces* "*tecum;* and that, in executing this order, the Sergeant-at- "Arms shall cause the said Kilbourn to be kept in his cus- "tody in the common jail of the District of Columbia."

The plea further alleged, that the Speaker duly issued his warrant, which contained a copy of said resolution, to the Sergeant-at-Arms, directing him to carry out the foregoing resolution of the House, and that the Sergeant-at-Arms, in accordance with the command thereof, gently laid his hands on the said plaintiff and arrested him and took him into custody and conveyed him to the common jail of the District of Columbia and kept him in custody therein until the 18th day of April, 1876, when, in response to a writ of *habeas corpus* issued by the Chief Justice of the District of Columbia, and by virtue of an order of the House of Representatives he produced the said plaintiff before the said Chief Justice in the court-house of said District and delivered him into the custody of the Marshal of said District, under the order of the said Chief Justice; that the said defendants did not in any manner assist in the last mentioned arrest and imprisonment, nor were they in any way concerned in the same except by their votes in favor of the said resolution and as members of the House of Representatives; that the said supposed trespasses, in the plaintiff's declaration mentioned, are none other than those herein above set forth, and that during all the period aforesaid Congress was in session, and the defendants were members of the House of Representatives.

To this plea, there was a demurrer and joinder in demurrer.

The defendant, John G. Thompson, pleaded separately: 1st. The general issue; and, 2d. A special plea, substantially like the one pleaded by the other defendants, but alleging that he was Sergeant-at-Arms of the House of Rep-

resentatives, and as such performed the several acts in the plea set forth.

To this plea there was a demurrer and joinder in demurrer.

The Supreme Court of the District ~~sustained~~ overruled these demurrers by a divided court, three judges being in favor and two against ~~sustaining~~ overruling the same.

Argument.

Upon the facts admitted in these pleadings we propose to consider—

1. The power of the House of Representatives to arrest and commit persons guilty of a contempt of its authority.

2. Its power to conclusively determine the fact of contempt; and

3. The protection that should be afforded to those who execute its commands.

I. That the House has exercised this power from the foundation of the Government to the present time is abundantly shown by the record of its proceedings. Among the cases that might be cited, we refer to the following:

Case of Robert Randall—House, 1795. Charged with an attempt to corrupt members of the House.

Case of William Duane—Senate, 1800. Charged with having published a libel on the Senate.

Case of John Anderson—House, 1818. Charged with bribery. *Anderson* vs. *Dunn*, 6 Wheat., 204.

Case of Samuel Houston—1832, House. Charged with having assaulted a member of the House.

Case of John Nugent—Senate, 1848. Charged with refusing to answer as a witness.

Case of J. W. Simonton—House, 1857. Same charge.

Case of J. D. Williamson—House, 1858. Charge, contumacy as a witness.

Case of John W. Wolcott—House, 1858. Same charge.

Case of Thadeus Hyatt—Senate, 1860. Same charge.

Case of Patrick Woods—House, 1870. Assault on a member.

Cases of H. J. Ramsdell and L. S. White—Senate, 1871. Refusing to testify.

Case of Joseph B. Stewart—House, 1873. Same charge.

In each of these cases the persons charged were actually taken into custody by the Sergeant-at-Arms of the respective Houses.

That the House of Representatives has the right to arrest and commit for contempt has been settled by the judgment of this Court.

In *Anderson* vs. *Dunn*, 6 Wheat., 204, the facts were these: Anderson brought an action of trespass against Dunn in the Circuit Court of the District of Columbia for assault and battery. The defendant pleaded specially that he was the Sergeant-at-Arms of the House of Representatives and required to execute its commands; that the plaintiff had been adjudged by the House guilty of a breach of its privileges, and a high contempt of its dignity and authority; that the House had directed that a warrant should issue to its Sergeant-at-Arms, directing him to arrest the plaintiffs and bring him before the House to answer said charges; that he was so arrested and brought before the bar of the House and adjudged by it in contempt, and the Speaker was directed to reprimand him, which was done, and he was thereupon discharged.

To this plea the defendant demurred, and the demurrer

was overruled by the Court below. This Court affirmed the judgment.

The Court said: "Notwithstanding the range which has been taken by the plaintiff's counsel in the discussion of this cause, the merits of it really lie in a very limited compass. The pleadings have narrowed them down to the simple inquiry whether the House of Representatives can take cognizance of contempts committed against themselves under any circumstances. The duress complained of was sustained under a warrant issued to compel the party's appearance, not for the actual infliction of punishment for an offense committed. Yet it cannot be denied that the power to institute a prosecution must be dependent upon the power to punish. If the House of Representatives possessed no authority to punish for contempt, the initiatory process issued in the assertion of that authority must have been illegal; there was a want of jurisdiction to justify it."

"It is certainly true that there is no power given by the Constitution to either House to punish for contempts, except when committed by their own members. Nor does the judicial or criminal power given to the United States, in any part, expressly extend to the infliction of punishment for contempt of either House, or any co-ordinate branch of the Government. Shall we, therefore, decide that no such power exists?"

After showing that the power exists by implication, the Court, in answering the argument that the power was liable to abuse, said: "But what is the alternative? The argument obviously leads to the total annihilation of power of the House of Representatives to guard itself from contempts, and leaves it exposed to any indignity and interruption that rudeness, caprice, or even conspiracy may meditate against it. This result is fraught with too much

absurdity not to bring into doubt the soundness of any argument from which it is derived. That a deliberative assembly, clothed with the majesty of the people, and charged with the care of all that is dear to them; composed of the most distinguished citizens, selected and drawn together from every quarter of a great nation, whose deliberations are required by public opinion to be conducted under the eye of the public, and whose decisions must be clothed with all that sanctity which unlimited confidence in their wisdom and purity can inspire—that such an assembly should not possess the power to suppress rudeness or repel insult is a supposition too wild to be suggested; and, accordingly, to avoid the pressure of these considerations, it has been argued that the right of the respective Houses to exclude from their presence, and their absolute control within their own walls, carry with them the right to punish contempts committed in their presence, while the absolute legislative power given to Congress within this District enables them to provide by law against all other insults against which there is any necessity for providing."

It is to be observed that, so far as the issue of this cause is implicated, this argument yields all right of the plaintiff in error to a decision in his favor, for *non constat* from the pleadings, but that this warrant issued for an offense committed in the immediate presence of the House.

Nor is it immaterial to notice what difficulties the negation of this right, in the House of Representatives, draws after it, when it is considered that the concession of the power, if exercised within their walls, relinquishes the great grounds of the argument, to wit, the want of an express grant, and the unrestricted and undefined nature of the power here set up. For, why should the House be at liberty to exercise an ungranted, an unlimited and undefined power within their walls any more than without them? If the analogy with individual right

and power be resorted to, it will reach no farther than to exclusion, and it requires no exuberance of imagination to exhibit the ridiculous consequences which might result from such a restriction, imposed upon the conduct of a deliberative assembly. And would their situation be materially relieved by resorting to their legislative power within the District? That power may, indeed, be applied to many purposes, and was intended by the Constitution to extend to many purposes indispensible to the security and dignity of the General Government; but there are purposes of a more grave and general character than the offences which may be denominated contempts, and which, from their very nature, admit of no precise definition. Judicial gravity will not admit of the illustrations which this remark would admit of. Its correctness is easily tested by pursuing, in imagination, a legislative attempt at defining the causes to which the epithet might be reasonably applied. But, although the offence be held undefinable, it is justly contended that the punishment need not be indefinite, nor is it so. We are not now considering the extent to which the prosecuting power of Congress, by a legislative act, may be carried. On that subject, the bounds of their power are to be found in the provisions of the Constitution. The present question is, what is the extent of the punishing power which the deliberative assemblies of the Union may assume and execute, on the principle of self-preservation? Analogy, and the nature of the case, furnish the answer—'the least possible power adequatete to the end proposed;' which is the power of imprisonment. It may, at first view, and from the history of the practice of our legislative bodies, be thought to extend to other inflictions. But every other will be found to be mere commutation for confinement, since commitment alone is the alternative where the individual proves contumacious. And even to the duration of imprisonment, a period is imposed by the nature

of things, since the existence of the power that imprisons is indispensable to its continuance; and, although the legislative power continues perpetual, the legislative body ceases to exist on the moment of its adjournment, or periodical dissolution, it follows that imprisonment must terminate with that adjournment."

Wickelhausen vs. *Willett*, 10 Abbott, Pr., 163, was an action brought by the plaintiff against the defendant, who was a sheriff, for the escape of one John D. Williamson, who had been arrested upon execution against his person, and was confined within the liberties of the jail.

The defense was, that Williamson had been subpœnaed by the House of Representatives of Congress to appear before said House, or a committee thereof, and give evidence in a matter then pending and under investigation by said House, and within its jurisdiction; that Williamson, being so confined within the jail limits, did not appear in obedience to said subpœna, and thereupon he was adjudged in contempt by the House, and a warrant duly issued to the Sergeant-at-Arms to bring him forthwith before the House to answer said charge, and the Sergeant-at-Arms did arrest him within the jail liberties, and take him before said House, and while he was thus in charge of the Sergeant-at-Arms this suit was brought.

The statute of New York provided that a person in custody for debt should be kept within the jail limits, unless taken out upon process equivalent to *habeas corpus*, or in a case provided by law. HOFFMAN, Judge, delivered a learned opinion, to which the attention of this court is invited.

He reviewed at length the authorities, and, among other things, said:

"Has the Constitution of the United States, or any other law, placed either branch of the Congress of the United

States in a different position as a legislative assembly, and forbidden it the exercise of this ordinary power?

It might be sufficient to refer to the case of *Anderson* vs. *Dunn*, 6 Wheat., 204, as covering the question. A decision that the authority can be exerted upon a person not a member, to take him into custody and restrain his liberty for contemptuous conduct, is a stronger position than is necessary to sustain the privilege in this instance.

In my opinion, the legality of the proceeding in question here may be rested upon principles which cannot be shaken. The Government of the United States is supreme within its sphere of action. It is the government of the people, and emanated from them. Its powers were delegated by all, it acts for all, and it represents all. What is thus true of the aggregate, is true of each component part of that government in its appropriate sphere. What is necessary to enable either branch to fulfil its functions and discharge its duties is impliedly vested in that branch by the will of the people. 'What is necessary, does not impute an absolute physical, necessity, so that one thing cannot exist without the other. It stands for any means calculated to attain the end, appropriate and plainly adapted to it, and not prohibited.' Now, the power of investigation, through a committee, is essential to wise legislation. The power to call for information from others flows from this necessity. Hence, the old formula of authority to send for persons and papers. But to rob the process of such a committee of all compulsory effect, to reduce it to a request, to deny all means of enforcement, and all power to punish for disobedience, would be to render inquiry often fruitless, to exclude sources of information, and to impair or defeat the objects of legislation.

In my judgment, neither branch of Congress has the right to disclaim the power I deem it to possess, and which in this instance, the House of Representatives has exercised.

It is a power clothed with a trust, and vested for the fulfilment of a trust. It is identical with, or manifestly important to, the discharge of that trust. It cannot be renounced without impairing the means of duly executing the office committed to the body, and, therefore, may not be relinquished without a breach of duty." * * * "If the views I have taken be correct, the being out of prison was upon a process equivalent to a *habeas corpus*, or in a case provided by law."

See *Yates* vs. *Lansing*, 9 Johns., 417;
Hiss vs. *Bartlett*, 3 Gray, 468;
Johnson vs. *Commonwealth*, 1 Bibb, 598.

The same rule is laid down in all the text-books.
1 Kent, 11th ed., 244;
Story on Const., § 845, 849;
Rawle Const., 254.

It is very forcibly stated in Sergeant Const. Law, ~~534~~ 254. He says: "The different branches of the legislature have power by implication to ~~prevent~~, by imprisonment or any commutation therefor, any person guilty of a contempt towards either of them, whether committed within their walls of meeting or without; whether within the District of Columbia, or in any part of the United States. They have power to arrest a person whom they declare guilty of a breach of their privileges and of contempt, and to bring him before them for punishment; and their warrant for that purpose, duly issued and signed by the Speaker and Clerk, is a sufficient justification to their Sergeant-at-Arms in executing and obeying it. The grant in the Constitution of power to punish or expel members does not abridge this power. That is only a grant of an additional power which might otherwise have been questioned. They are not bound, in the first instance, to define such contempts and ascertain their punishment by legislative act. The

modes in which this offense may be committed are not, in their nature, susceptible of legislative definition. Such power is indisputably necessary to the security and liberty of the public functionaries and to the safety of the people."

The same doctrine is held by the English courts.

Alexander Murray's case, 1 Wils., 299.

In *Burdett* vs. *Abbott*, 14 East., 1, the subject was exhaustively examined by Lord ELLENBOROUGH, Ch. J. Abbott brought an action of trespass against Burdett for arresting and confining him in the Tower of London. The defendant justified on the ground that he was the Speaker of the House of Commons; that the plaintiff was a member of the House, and had been guilty of a breach of the privileges of the House in publishing a certain libelous and scandalous paper reflecting on the just rights and privileges of the House; that the House had ordered that he should be committed to the Tower, and that the Speaker should issue his warrant therefor; that the warrant was issued to the Sergeant-at-Arms, and executed by his arresting the plaintiff and delivering him to the custodian of the Tower. The Chief Justice said: "The privileges which belong to them" (the Houses of Parliament) "seem at all times to have been, and necessarily must be, inherent in them independent of any precedent. It was necessary that they should have the most complete personal security, to enable them freely to meet for the purpose of discharging their important functions, and also that they should have the right of *self-protection*. I do not mean merely against acts of individual wrong, for poor and impotent indeed would be the privileges of Parliament if they could not also protect themselves against injuries and affronts offered to the aggregate body which might prevent or impede the full and effectual exercise of their parliamentary functions. This is an essential right necessarily inherent

in the Parliament assembled in two houses as in one. The right of self-protection implies, as a consequence, a right to use the necessary means for rendering such self-protection effectual. Independently, therefore, of any precedents or recognized practice on the subject, such a body must *a priori* be armed with a competent authority to enforce the free and independent exercise of its own proper functions, whatever those functions might be. On this ground it has been, I believe, very generally admitted in argument that the House of Commons must be and is authorized to remove any immediate obstructions to the due course of its own proceedings. But this mere power of removing actual impediments to its proceedings would not be sufficient for the purposes of its full and efficient protection. It must also have the power of protecting itself from insult and indignity, whenever offered, by punishing those who offer it. Can the high court of Parliament, or either of the two Houses of which it consists, be deemed not to possess intrinsically that authority of punishing summarily for contempts which it acknowledged to belong, and is daily exercised as belonging, to every superior court of law, of less dignity, undoubtedly, than itself? And is not the degradation and disparagement of the two Houses of Parliament, in the estimation of the public, by contemptuous libels, as much an impediment to their efficient acting with regard to the public, as the actual obstruction of an individual member by bodily force in his endeavor to resort to the place where Parliament is holden? And would it consist with the dignity of such bodies—or, what is more, with the immediate and effectual exercise of their important functions—that they should wait the comparatively tardy result of a prosecution, in the ordinary course of law, for the vindication of their privileges from wrong and insult? The necessity of the case would, therefore, upon principles of natural reason, seem

to require that such bodies, constituted for such purposes and exercising such functions as they do, should possess the powers which the history of the earliest times shows that they have, in fact, possessed and used."

See *Beaumont* vs. *Barrett*, 1 Moore Privy Council Cases, 59;

Gossett vs. *Howard*, 10 Adolph & Ellis N. S., 447.

II.—The decision of the House of Representatives, as to the fact of contempt, is conclusive, and cannot be collaterally impeached.

We have already shown that the House has jurisdiction to arrest and punish for contempt. Having jurisdiction, its decision must be final and conclusive, unless reviewed by some higher authority on error or appeal.

But there is no such higher authority.

In the case of *Anderson* vs. *Dunn*, the plea did not set out the facts that constituted the contempt.

It alleged simply that Anderson had been adjudged guilty of a contempt. This court must have regarded the matter as conclusively settled by the judgment of the House.

In *ex parte Kearney*, 7 Wheat., 38, this court held that Kearney, who had been committed to jail by the Circuit Court of the District of Columbia, for refusing to answer a question put to him on the trial of a criminal case, could not be discharged on *habeas corpus*, because the judgment for contempt was final, and could not be reversed by this court.

STORY, Judge, said: "It is also to be observed that there is no question here, but that this commitment was made by a court of competent jurisdiction, and in the exercise of an unquestionable authority. The only objection is, not that the court acted beyond its jurisdiction, but that it erred in its judgment of the law applicable to the case. If, then, we are to give any relief in this case, it is by a revision of the

opinion of the court, given in the course of a criminal trial, and thus asserting a right to control its proceedings, and take from the conclusive effect which the law intended to give them. If this were an application for a *habeas corpus*, after judgment on an indictment for an offence within the jurisdiction of the court, it could hardly be maintained that this court could revise such a judgment, or the proceedings which led to it, or set it aside and discharge the prisoner. There is, in principle, no distinction between that case and the present, for when a court commits a party for a contempt, their adjudication is a conviction, and their commitment, in consequence, is execution; and so the law was settled upon full deliberation, in the case of *Brass Crosby*, Lord Mayor of London, 3 Wilson, 188."

Hurd on Habeas Corpus, 2d ed., 405, says the decision is conclusive unless *absolutely void.*

In *Stockdale* vs. *Hansard*, 9 Adolph. & Ellis, 1, Lord DENMAN said:

"Where the subject-matter falls within their jurisdiction, no doubt we cannot question their judgment; but we are now inquiring whether the subject-matter does fall within the jurisdiction of the House of Commons."

In the case of the *Sheriff of Middlesex*, 11 Adolph. & Ellis, 273, the warrant did not set out the particulars of the contempt of the House of Commons, but the court held the warrant good. The same principle is held in *Burdett* vs. *Abbott*, 14 East., 1, and *Gossett* vs. *Howard*, 10 Adolph. & Ellis, N. S., 447.

In the case now under consideration, all the defendants, except Thompson (who was the Sergeant-at-Arms), were members of the House, and took no part in the proceedings against the plaintiff, or in his arrest, except in making their report to the House, and in voting on the same and the resolutions adopted by the House. If they are liable for

these votes, then every member of the House, who voted in the same way, is equally liable, and the provision of the Constitution that, "for any speech or debate in either house, they shall not be questioned in any other place," (Art. 1, Sec. 6,) is of no avail.

In thus casting their votes, they were acting as members of a court of judicature, over a subject of which they had jurisdiction, and, therefore, were not liable to a private action.

Randall vs. *Bingham*, 7 Wall., 523;
Bradley vs. *Fisher*, 13 Wall., 335.

In these cases it was held that judges of courts of general jurisdiction were not liable to civil actions for their judicial acts, even when such acts were in excess of their jurisdiction, and were alleged te have been done maliciously or corruptly.

Upon the authorities we have cited, we think it clear that the judgment must be affirmed as to all of the defendants, unless it be Thompson, the Sergeant-at-Arms. And that brings us to inquire—

III.—What protection the law gives to the officers of the House of Representatives, who execute its commands.

Thompson was Sergeant-at-Arms. The warrant placed in his hands recited the action of the House, and required him to arrest the plaintiff, and keep him in his custody, in the common jail of the District of Columbia, until he was willing to appear before the House and answer the questions which he had refused to answer.

It showed a case in which the House had jurisdiction, for it is well settled that a person is bound to obey the subpœna of the House, and appear before one of its committees.

Weikelhausen vs. *Willett*, 10 Abbott, Pr., 164;
Burnham vs. *Morressy*, 14 Gray, 226;
Emery's Case, 107 Mass, 180.

It was a complete protection to him upon the principle determined in *Erskine, Coll.*, vs. *Hohnbach*, 14 Wall., 613. Erskine was a collector of internal revenue, and as such seized certain personal property of Hohnbach to satisfy an assessment of a tax that had been duly made by the assessor and placed in Erskine's hands, with an order directing its collection. Hohnbach sued in trespass. The defendant justified, and set out the foregoing facts in his plea. Plaintiff replied that the tax was never chargeable to him. This Court held that the order of the assessor was a complete defense to the collector. FIELD, Judge, said: "Whatever may have been the conflict at one time, in the adjudged cases, as to the extent of protection afforded to ministerial officers acting in obedience to process, or orders issued to them by tribunals or officers invested by law with authority to pass upon and determine particular facts and render judgment thereon, it is well settled now that if the officer or tribunal possess jurisdiction over the subject-matter upon which judgment is passed, with power to issue an order or process for the enforcement of such judgment, and the order or process issued thereon to the ministerial officer is regular on its face, showing no departure from the law or defect of jurisdiction over the person or property affected, then and in such cases the order or process will give full and entire protection to the ministerial officer, in its regular enforcement, against any prosecution which the party aggrieved thereby may institute against him, although serious errors may have been committed by the officer or tribunal in reaching the conclusion or judgment upon which the order or process is issued."

Savacool vs. *Boughton*, 5 Wend., 171;

Earl vs. *Camp*, 16 *Id.*, 563;
Chegaray vs. *Jenkins*, 5 New York, 376;
Sprague vs. *Buchard*, 1 Wis., 457.

In *Haffin* vs. *Mason*, 15 Wall., 671, the same doctrine was maintained. The Court held that the collector was protected, whether the assessor had authority to make the assessment or not.

Applying these principles to the case of Thompson, and we maintain with great confidence that he is protected by the order of the House and its process.

Plaintiff's counsel, in their brief, seem to place their main reliance upon the point that Sections 102 and 104 of the Revised Statutes make the conduct of the plaintiff punishable by fine and imprisonment, and they argue that he cannot be punished for the contempt, otherwise he would suffer double punishment for one offense. There is nothing in the record to show that he was ever indicted or convicted under the statute.

The authorities cited by them do not sustain their claim. There is not one of them which holds that punishment of an indictable act for contempt bars a prosecution for the crime, but, on the contrary, the uniform current of authority is the other way.

This question was made at a very early day in *Rex* vs. *Opulston*, 2 Strange, 1107, which was an information against the defendant for contriving to get a young lady out of the custody of her guardian and marrying her. The Court of Chancery had committed the defendant for contempt, and it was claimed that, for that reason, the information could not be maintained, but the Court held otherwise.

King vs. *Pierson et al.*, Andrew's Rep., 310, was an information against the persons who were engaged with Opulston in decoying the young lady, and the same de-

fense was made for them. The Court said: "As to the commitment by the Court of Chancery, that was for a contempt only, and, therefore, it is no reason against punishing the defendants for the satisfaction of public justice and by way of public example."

State vs. *Yancy*, Carolina Law Rep., 519, was an indictment for assault and battery. Plea, *autre fois convict*, on which the jury found specially that the defendant had been fined for a contempt, the assault having been committed in view of the court. TAYLOR, C. J., "The punishment for contempt is not a bar to this prosecution. The first was in the exercise of a power incident to all courts of record, and essential to the administration of the laws.

Although but one injury is done to the individual assaulted, yet the same act constitutes two public offences, which, according to the circumstances, might require different degrees of punishment. The court may punish in a summary way its officers abusing its process by oppressing the parties, or committing extortion, fraud or malpractice, yet none of these offences are merged in the contempt."

In *State* vs. *Woodfin*, 5 Iredell, 199, it was held that the punishment for a contempt, and a conviction on an indictment for the same act, when a crime, were *diverso intuitu*, and could stand together.

State vs. *Williams*, 2 Speer, S. Car., 26, was a case in principle much like the one under consideration.

The defendant was a constable, and had been indicted for habitual intoxication, under a statute which punished that offence, in a constable, with imprisonment, or removal from office, or both, in the discretion of the court. He was required by the court to show cause why he should not be struck from the roll of constables. It was objected that, to

do so, would be double punishment for the same offence. The Court said: "We think these provisions do not supersede or impair a judge's common law jurisdiction over the subordinate officers of the court. That jurisdiction must frequently be directed so as to prevent, rather than remedy, the mischief, by promptly depriving such officer of all power of doing wrong. This power of a judge to strike from the roll an offending constable, has been too often and too long exercised in this State, as a common-law right, to be now questioned, and, until it is taken away by statute, may be wholesomely exercised."

In *ex parte Brounsall*, 2 Cowp., 829, Lord MANSFIELD held that an attorney who had been convicted of stealing a guinea, and had been burnt in the hand therefor, should be stricken from the roll of attorneys.

See *Vestner* vs. *Martin*, 10 Sm. & M., 103;
Foster vs. *Commonwealth*, 8 Watts & S., 77;
In re King, 8 Queen B., 129;
In re Wright, 1 Exch., 658;
Regina vs. *Martin*, 5 Cox, C. C., 356;
People vs. *Stevens*, 13 Wend., 341;
Levy vs. *The State*, 6 Ind., 281;
Waldo vs. *Wallace*, 12 *Id.*, 569;
Phillips vs. *People*, 55 Ills., 429;
2 *Bishop, Cr. Law*, 6 Ed., § 264; and
Moore vs. *The People*, 14 How., 13.

Moore had been indicted and convicted, under the criminal code of Illinois, for "harboring and secreting a negro slave."

It was argued in this court that the statute of Illinois was void, because it conflicted with the article of the Constitution relating to fugitives from labor, and the act of Congress on that subject, and because it subjected the defendant to a double punishment for a single offence.

Mr. Justice GRIER, in delivering the opinion of the Court, and in answering the argument that the punishment was double, said: "But admitting that the plaintiff in error may be liable to an action for the same acts of harboring and preventing the owner from retaking his slave, it does not follow that he would be twice punished for the same offense. An offense, in its legal signification, means the transgression of a law. A man may be compelled to make reparation in damages to the injured party, and be liable to punishment for a breach of the public peace in consequence of the same act, and may be said, in common parlance, to be twice punished for the same offense. Every citizen of the United States is also a citizen of a State or Territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be an offense or transgression of the laws of both. Thus an assault upon the marshal of the United States, and hindering him in the execution of legal process, is a high offense against the United States, for which the perpetrator is liable to punishment; and the same act may also be a gross breach of the peace of the State—a riot, assault, or a murder—and subject the same person to a punishment, under the State laws, for a misdemeanor or felony. That either or both may (if they see fit) punish such an offender cannot be doubted. Yet it cannot be truly averred that the offender has been twice punished for the same offense, but only that *by one act he has committed two offenses, for each of which he is justly punishable.* He could not plead the punishment by one in bar to a conviction by the other; consequently, this Court has decided, in the case of *Fox* vs. *The State of Ohio*, (5 How., 432,) that a State may punish the offense of uttering or passing false coin as a cheat or fraud practiced on its citizens; and in the case of the *United States* vs. *Marigold*, (9 How., 560,) that Congress, in the proper

exercise of its authority, may punish the same act as an offense against the United States."

In the light of these authorities there is no room for doubt about the question. Kilbourn, by refusing to produce his books and answer the questions propounded to him, was guilty of two offenses—one against the House of Representatives, for which punishment for contempt was the appropriate penalty, and the other against the United States, for which indictment and fine and imprisonment had been provided by law. Conviction and punishment for either offense is no bar to a prosecution or proceeding for the other.

The plaintiff's counsel also claim that the House of Representatives have no powers except those expressly granted, and inasmuch as there is no express power to punish one not a member for contempt, therefore no such power exists.

It is a sufficient answer to this argument to refer to the case of *Anderson* vs. *Dunn*, in which it was expressly held by this Court that such power does exist in the House, and that it is implied from other powers which are unquestioned.

It is contended by plaintiff's counsel that the House had no jurisdiction over the subject-matter about which its committee was directed to inquire and report.

It is the appropriate business of the legislative branch of the Government to make laws, and of the judiciary to interpret them when made. It is certainly legitimate for either house to charge one of its committees with the duty of inquiring what legislation has taken place on any given subject, and what additional legislation, if any, is needed in order to fully protect either public or private interests. That was all that was done in the case now under consideration.

The firm of Jay Cooke & Co. were debtors to the United States. They were bankrupt. Their indebtedness had grown out of certain deposits made with them by the Secretary of the Navy. They were interested in what was known as "the Real Estate Pool," and that interest, as was alleged, had been compromised with the trustee of the bankrupt firm, and in such a manner as to prejudice the claim of the Government. The committee was appointed, and instructed to inquire into these subjects, and "report to this House." What kind of a report they should make was left to the discretion of the committee. They might report that the "settlement" was an unwise one, and should be further contested in the court, and might recommend that the proper officer of the Department of Justice should be instructed to prosecute the matter, and, if necessary, carry the case to a higher tribunal; or they might report that a new law should be enacted preventing such deposits in future. The whole subject was before them. It was, undoubtedly, within their legislative power. They called the plaintiff before them, and propounded to him certain questions, which are alleged in the plea, and admitted by the demurrer, to have been *pertinent* and *material* to the question of inquiry before the committee. He refused to answer them, and, thereby, justly incurred the penalties imposed upon those who defy the power of the House, and are guilty of a contempt of its authority.

Lastly, it is objected that the warrant issued to the Sergeant-at-Arms did not authorize him at once to confine the plaintiff in the jail of the District, but that it contemplated taking him before the committee again, and upon his then refusing to answer, committing him to the custody of the jailor.

Unfortunately for this argument, it is not true in point of fact. There was no such clause in the warrant, nor

anything equivalent to it, as an inspection of the instrument will show. The warrant did permit him to state whether he was willing to answer the questions and obey the subpœna *duces tecum*; and *if he were*, then and not otherwise it was made the duty of the Sergeant-at-Arms to take him before the committee. He was not willing, and was, therefore, committed into the custody of the jailor, as the warrant directed. He was the arbiter of his own destiny, and chose to take the consequences of a refusal to obey the order of the House.

We think that he was lawfully committed, and that he is without legal remedy. We ask that the judgment of the Court below may be affirmed.

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WALTER H. SMITH,
Att'ys for Def'ts in Error.